

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5**

**VEOLIA TRANSPORTATION SERVICES,
INC. d/b/a VEOLIA TRANSPORTATION,**

Employer,

and

Case No. 05-RC-137335

**AMALGAMATED TRANSIT UNION
LOCAL 689, associated with
AMALGAMATED TRANSIT UNION,
AFL-CIO**

Petitioner.

**EMPLOYER VEOLIA TRANSPORTATION SERVICES, INC.'S
POST-REVIEW MEMORANDUM**

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TABLE OF CONTENTS

I. PROCEDURAL BACKGROUND	3
II. ISSUE.....	6
III. STATEMENT OF FACTS	6
A. Company Background.....	6
B. Operational Structure of Veolia Metroaccess	8
1. Managers.....	8
2. Lead Road Supervisors	8
3. Road Supervisors	9
C. Use of Incident Reports.....	12
D. Use of Road Observation Reports.....	14
E. Use of Accident Folder Checklist.....	19
F. Authority to Remove an Operator from Service.....	20
G. Road Supervisors Reward Operators	22
H. The Hot List	23
I. Testifying on Behalf of the Employer	23
J. Road Supervisors Operate MetroAccess Vans.....	24
IV. DISCUSSION.....	24
A. Applicable Legal Principles of Supervisors Under the Act	24
B. The Road Supervisors Are Statutory Supervisors Under Section 2(11) of the Act Because They Discipline and Effectively Recommend Discipline of Operators.....	25
1. Road Supervisors Directly Issue Discipline to Operators.....	28
2. Road Supervisors Effectively Recommend Discipline.....	34
C. Veolia has Also Established the Road Supervisors Are Statutory Supervisors Under the Act Because They Reward Operators	41
D. Veolia's Road Supervisors Are Statutory Supervisors Under the Act Because They Responsibly Direct Operators	41
E. Applicable Secondary Indicia of Supervisory Status of the Road Supervisors.....	44
1. Access	44
2. Uniforms	45
3. Authority to Remove Operators From Service	45

4. Access to Computers and Email	46
5. Supervisory Ratio.....	47
6. Road Supervisors' Access to Employee Information	47
7. View Themselves As Supervisors	48
8. Supervisory Meetings	49
9. Training.....	49
10. Equipment.....	49
11. Testifying On Behalf of the Employer.....	50
F. In The Event The Region Finds The Road Supervisors Are Not Supervisors Under The Meaning of Section 2(11) of the Act, the Road Supervisors Should Be Encompassed In the Two Collective Bargaining Agreements Entered Into By Veolia With the Amalgamated Transit Union, Local 1764 and International Brotherhood of Teamsters, Local 639.....	51
V. CONCLUSION.....	53

**EMPLOYER VEOLIA TRANSPORTATION SERVICES, INC.'S
POST REVIEW MEMORANDUM**

Comes now, Employer VEOLIA TRANSPORTATION SERVICES, INC. ("Veolia" or "Employer" or "Company"), by and through its undersigned counsel, pursuant to Section 102.67 of the National Labor Relations Board Rules and Regulations, and herewith submits its Post-Review Memorandum.

I. PROCEDURAL BACKGROUND

On August 6, 2014, Amalgamated Transit Union, Local 689 ("Union" and/or "Petitioner") filed its Petition with the Board seeking to become the collective bargaining representative of Road Supervisors, Safety and Training Supervisors, and Safety Trainers employed by Veolia at its facilities located at 3201 Hubbard Road in Hyattsville, Maryland and 2219 Adams Place NE in Washington D.C. In accordance with NLRB procedures, the Board conducted a one (1) day hearing on October 7, 2014, before Hearing Officer Jason Usher. Appearing for the Employer were James N. Foster, Jr., Esq. and Dean Kpere-Daibo, Esq. appearing for the Petitioner was Douglas Taylor, Esq. and Brian Connolly, Esq. the Employer presented three witnesses at hearing.

During the hearing and on the record, the Petitioner withdrew its initial Petition to the extent the Union was no longer seeking to represent the Safety and Training Supervisors and Safety Trainers. (TR: 7-8). The Union sought in its amended Petition to only represent the Road Supervisors and Lead Road Supervisors, excluding Safety and Training Supervisors and Safety Trainers among others. (TR: 7-8). As a result of the Petitioners' partial withdrawal of its original Petition, Veolia moved for the Regional Director to issue an Order approving the withdrawal of the Union's Petition seeking to represent the full-time and regular part-time Safety and Training

Supervisors and Safety Trainers pursuant to Rule 102.60 of the National Labor Relations Board Rules and Regulations. (TR: 7-8).

Additionally, the NLRB failed to provide notice of the October 7, 2014 hearing to the Amalgamated Transit Union, Local 1764 ("ATU") and International Brotherhood of Teamsters, Local 639 ("Teamsters"). Notice to the ATU, Local 1764 and Teamsters, Local 639 was required pursuant to Rule 102.63(a) of the National Labor Relations Board Rules and Regulations as they are labor organizations that represent employees that will be affected by these proceedings. Road Supervisors perform driving work which is under the exclusive jurisdiction of the bargaining units represented by the ATU, Local 1764 and Teamsters, Local 639. In the event the Board determines that the Road Supervisors are not supervisors within the meaning of the Act, ATU, Local 1764 and Teamsters, Local 639 would have an interest in the Road Supervisors and should be allowed an opportunity to be heard pursuant to Rule 102.65(b) of the National Labor Relations Board Rules and Regulations. (TR: 27). However, proper notice of this representation hearing was not provided to these parties who should be or otherwise will be affected by the proceeding and decision in this matter. (TR: 18).

On October 27, 2014, the Regional Director for Region 5 issued a Decision and Order, wherein the Regional Director correctly concluded Veolia's Road Supervisors are statutory supervisors pursuant to Section 2(11) of the Act inasmuch as, among other things, the Road Supervisors exercise independent discretion to discipline operators. In reaching this conclusion, the Regional Director went through an exhaustive legal and factual analysis of all applicable Board precedent and relevant facts that are specific and exclusive to the Road Supervisors employed by Veolia.

To come to such conclusion, the Regional Director found Veolia Road Supervisors have the authority to orally coach and counsel Veolia operators, write up operators, and remove operators from service. (*See* Decision and Order, p.15). The Regional Director further concluded when a Road Supervisor issues a verbal or written warning, such discipline goes into the operator's personnel file. (*See* Decision and Order, p.7,15). (*See* Decision and Order, p.7,15). Significantly, the Regional Director concluded the Road Supervisors' authority to issue verbal and written warnings to Veolia operators are explicitly contemplated by the progressive discipline systems contained in the two collective-bargaining agreements covering Veolia operators. Thus, the oral and written warnings issued by Road Supervisors fall under the purview of the collective bargaining agreements and, pursuant to the agreements, are grievable. Accordingly, the Regional Director concluded Road Supervisors have the authority to discipline employees at Veolia. (*See* Decision and Order, p.7-8). Equally as important, the Regional Director further concluded that these circumstances and facts were **in marked contrast** to the facts of *Diamond Transportation*, where evidence presented during that hearing failed to meet the Board's standard for determining supervisory status promulgated in *The Republican Co.*, 361 NLRB No. 15 (2014).

Moreover, the Regional Director concluded the Road Supervisors are statutory supervisors because they exercise independent judgment in determining the level of discipline to apply to an operator. Again, and equally as important, the Regional Director concluded the decision in *Diamond Transportation* and the decision in the matter at hand are distinguishable because in this case, Veolia presented uncontroverted record evidence demonstrating that the operators are subject to a progressive discipline system and Road Supervisors' written warnings and memorializations of oral warnings are placed in operators' personnel files.

Finally, the Regional Director held the numerous secondary indicia of supervisory status, including, but not limited to, different uniforms, office space accessibility, training, management meetings, and the ratio of supervisors to operators, also supports the conclusion that Road Supervisors are statutory supervisors.

II. ISSUE

On November 11, 2014, the Union filed its Request for Review of the Regional Director's Decision and Order. In its Request for "Review," the Union asserts "there is no distinction between the duties of Road Supervisors" in *Diamond Transportation* and the Road Supervisors in the matter at hand, and moved to have "the Review" in *Diamond* and this matter consolidated. (*See* Union's Request for Review). In addition, the Union asserts because Diamond Transportation and Veolia Transportation Road Supervisors both partly enforce WMATA rules and regulations, the Regional Directors' Decision and Order in this matter that Veolia's Road Supervisors are supervisors under the Act is incorrect.

The issue before the Board is whether the Road Supervisors sought to be represented by the Union in its petition are statutory supervisors under Section 2(11) of the Act. If not, whether the Road Supervisors are covered by the Amalgamated Transit Union, Local 1764 and the International Brotherhood of Teamsters, Local 639 Collective Bargaining Agreements.

III. STATEMENT OF FACTS

A. Company Background

Veolia Transportation contracts with cities, counties, airports, companies and universities to operate their transportation systems. In regards to the matter at hand, Veolia contracts with the WMATA to perform transit services for disabled and vulnerable customers. (Ex.14); (TR: 17). Veolia is merely one of three transportation providers' services for WMATA's MetroAccess

Project. (TR: 17). In order to provide paratransit transportation services to the MetroAccess Project under WMATA, Veolia was required to enter into a contract with WMATA for such services which began in 2013. (Ex.14). Pursuant to that contract, Veolia employs approximately six hundred (600) employees to service the WMATA transportation contract. (TR: 8). Additionally, as a result of the change in service provider, Veolia entered into an agreement with the Amalgamated Transit Union, Local 1764 and International Brotherhood of Teamsters Union, Local 639 to hire all MV Transportation (the prior service provider) MetroAccess drivers and to recognize Local 1764 and Local 639 Collective Bargaining Agreements. (Ex-1; Ex-2); (Ex.14).

Currently there are two facilities used by Veolia pursuant to the WMATA contract: 3201 Hubbard Road in Hyattsville, Maryland and 2219 Adams Place NE in Washington D.C. (TR:47). Road Supervisors are stationed at both the Hubbard Road and Adams Place locations. (TR: 47). Road Supervisors perform their office work within the Operations office within the Hubbard Road Facility. (TR: 48). Within the Operations office, Road Supervisors have access to a cubicle which is specifically assigned to Road Supervisors. (TR: 48). In addition, Road Supervisors are exclusively assigned a computer and file cabinets where they file documents such as employee injury reports as well as their vehicle keys.¹ (TR: 47-49). Operators are not allowed within the Operations office unless called upon or beckoned by a Road Supervisor or another member of management that operates out of the Operations Department. (TR: 55-56).

Operations Center (hereinafter "OCC" or "Hyattsville"), which is operated exclusively by another Contractor, MV Transportation, handles the scheduling of routes and reservations. (TR: 73). Road Supervisors are in contact with Hyattsville regularly in order to notify OCC when a route has been shut down due to an incident or accident. (TR: 73) Road Supervisor Brian

¹ During the hearing, Road Supervisor Brian Jackson testified that Road Supervisors have access to injury, medical, and worker's compensation reports of operators in the Road Supervisors' cabinet located within the Operations Office. (TR: 50).

Jackson testified that when he makes the decision to take an operator out of service or keep an operator in service after an accident, he notifies Hyattsville to make OCC aware of the operator's status.² (TR: 73). Road Supervisors utilize two-way radios to stay in contact with OCC. (TR: 71).

B. Operational Structure of Veolia MetroAccess.

1. Managers

Michael Staley, Project Manager, is the highest ranking Veolia official within the Veolia MetroAccess project. (TR: 49). Immediately below the Project Manager is the Director of Operations, which is held by Melvin Barkley. (TR: 49-50). Below the Director of Operations are Larry Worthy and Shandall Hassan who serve as Operational Managers. (TR: 50). Each Operations Manager is exclusively assigned to and performs their duties on the a.m. or the p.m. shift. (TR: 50). The Director of Operations and the Operation Managers are responsible for overseeing the performance and the scheduling of Lead Road Supervisors and Road Supervisors. (TR: 52). Lastly, Director of Operations, Melvin Barkley, has an administrative assistant who accepts all of the Road Supervisors' paperwork which is submitted to Mr. Barkley. (TR: 84).

2. Lead Road Supervisors

Lead Road Supervisors serve as a liaison between OCC Dispatch and Road Supervisors; however, they perform all of the same duties as other Road Supervisors. (TR: 52; 96). For example, Brian Jackson testified that in the event an accident occurs, he will receive a call from a Lead Road Supervisor who will inform him of the location of the accident. (TR: 52). Lead Road Supervisors are not the direct supervisors or superiors of the Road Supervisors; they are merely utilized to assist in the line of communication between OCC and the Road Supervisors. (TR: 96-97) In fact, during the hearing, Road Supervisor Brian Jackson specifically addressed the

² Road Supervisor Brian Jackson further testified that Hyattsville does not have any input on whether he as the Road Supervisor takes an operator out of service.

relationship between the Lead Road Supervisors and Road Supervisors by testifying, “we’re all road supervisors. They’re not my boss at all. Lead road supervisor is not my boss.” (TR: 97).

3. Road Supervisors

The Lead Road Supervisors and Road Supervisors are primarily responsible for on the road supervision, monitoring, and observation of Veolia operators. (TR: 51-52; 173). Road Supervisors are responsible for responding to calls given by OCC, observing operators while on their route to ensure operators follow policies and procedures and operate their vans safely, performing accident and incident investigations, conducting minor troubleshooting of the vans, ensuring drivers and operators are fit for duty, and issuing discipline. (Ex.7; 8; 9; 10); (TR: 117; 129; 173-174; 177-178). Road Supervisors are assigned to an area by the Operations Director, Melvin Barkley; however, Road Supervisors decide independently when to conduct a road observation or coach and counsel an operator if the operator is not performing his duties properly. (TR: 52; 178-179). Road Supervisor Thomas Holtz testified that when he is out on the road, he will observe any operator and counsel an operator if he is not performing his job safely, regardless of whether the operator is a Veolia, First Transit, or Diamond Transportation operator. (TR: 179).

Additionally, along with the Road Supervisors’ duties to respond and investigate accidents, they are also responsible for determining the preventability of accidents. (Ex: 7; 13); (TR: 52-53; 57-59; 187). In making this determination, Road Supervisors are required to make a preliminary decision regarding the preventability of the accident based upon their own observations and facts they collect from the scene of the accident. (TR: 187; 57-59). Lastly, Road Supervisors have the authority to remove an operator from service if they feel the operator performed an unsafe act or violated Veolia or WMATA policies and procedures. (TR: 191-192;

60-61). In the event a Road Supervisor removes an operator from service, the operator is removed from his route and can no longer receive his hourly rate for his regularly scheduled shift. (TR: 116). When this occurs, the incident report or evaluation prepared by the Road Supervisor, which documents the removal of the operator, will be placed in the operator's personnel file. (TR: 116).

To perform their duties on the road, Road Supervisors are assigned "supervisor" vehicles. (Ex. 12); (TR: 133-135). As depicted in Employer Exhibit 12, these vehicles are small four-door white vehicles that are marked with the "MetroAccess" logo and the label "Supervisor" on the front driver-side and passenger-side doors. (Ex. 12). In addition, these vehicles are only driven by Road Supervisors to perform their duties in the field or by other members of management if necessary. (TR: 133-35). Operators are restricted from driving the Road Supervisor vehicles. (TR: 133-35). Operators are only authorized to operate the Metroaccess vans which are used to transport customers and are clearly marked with the "MetroAccess" logo in three different locations of the van. (Ex.11); (TR: 133).

In order to properly perform their job duties, Road Supervisors receive additional training that operators do not receive. (TR: 99-102; 174-75). Road Supervisors receive incident and accident report training through WMATA to teach them how to properly investigate accident and incident scenes. (TR: 175). Mr. Jackson testified that he was able to take a fact-finding investigation course that WMATA provided to Road Supervisors regarding the proper way to obtain information at accident scenes. (TR: 100). Road Supervisors receive a week long classroom training course regarding the policies and procedures Road Supervisors are required to enforce. (TR: 175).

In addition to the classroom training regarding policies and procedures and how to investigate incidents and accidents, Road Supervisors' training also consists of two (2) to three (3) weeks of "cadetring," where the Road Supervisor receives on-hand training from an experienced Road Supervisor. (TR: 100). During this "cadetring" period, a new Road Supervisor is taught how to fill out documents properly, and receives on-hand accident and incident scene training. (TR: 100; 175). Road Supervisors receive one (1) day of "reasonable suspicion" training, during which they are trained to observe the characteristics in an operator in order to determine whether an operator is intoxicated with drugs or alcohol. (TR: 103-04; 175). Veolia operators do not receive any of the described training. (TR: 175-76).

Moreover, in order to receive updated information regarding Veolia and WMATA policy and procedure, Road Supervisors attend two (2) separate monthly meetings. (TR: 97-98; 174). Road Supervisors are required to attend a monthly Veolia meeting with the Project Manager, Director of Operations, Operations Managers, and, at times, the Director of Safety. (TR: 98). Only managers and supervisors are allowed to attend these meetings as this is where managers and supervisors discuss new policies or procedure that will be implemented by Veolia or WMATA, how such policies will be enforced by the managers and supervisors, as well as any new incentive programs that will be implemented by Veolia for operators. (TR: 98-99).

Road Supervisors are also required to attend a meeting at the WMATA headquarters in Hyattsville every second Tuesday of the month. (TR: 174). These meetings are scheduled at nine (9) a.m. and last until twelve (12) p.m. (TR: 174). During these meetings, Veolia management, including Road Supervisors are provided policy and procedure updates and policy enforcement initiatives by WMATA. (TR: 98-99; 174). Only members of management attend the Veolia and WMATA monthly meetings. (TR: 174).

Lastly, both Lead Road Supervisors and Road Supervisors are required to wear a uniform which identifies them as supervisors. (TR: 199-200). Lead Road Supervisors and Road Supervisors are required to wear a white shirt, blue or black trousers, black boot like shoes with rubber soles, and a safety vest. (TR: 200). Printed on the Road Supervisors' white uniform shirt in the left corner is their title, "Road Supervisor." (TR: 200). Road Supervisors' uniforms are distinguishable from an operators' uniform which is a blue shirt, blue trouser, black rubber soled shoes, and a safety vest. (TR: 200-01).

C. Use of Incident Reports

One of the most significant duties of the Road Supervisors is the preparation of incident reports in the event an incident occurs with a MetroAccess vehicle. Pursuant to the Road Supervisor job duties, which each and Road Supervisor reviewed and accepted, Road Supervisors are required to complete incident reports "as required and effectively recommend remedial re-training, discipline as necessary." (Ex.10). Incident reports are utilized by Road Supervisors to document when incidents occur and to notify management of the decisions made by the Road Supervisor at the scene. (TR: 68; 140-141). Included in the incident report is the date of the incident, the operator's name, the coach or van number being operated at that time, the location of the incident, the type of incident which occurred, the name of the supervisor responding to the incident, and a full and detailed description of the incident. (Ex. 8); (TR: 68; 140-141). For example, Brian Jackson testified that Employer Exhibit 8 was an incident report he prepared from September 5, 2014, where he responded to an incident in which the passenger became irate and verbally abusive because she was not allowed to board the vehicle. (Ex. 8); (TR: 140). After responding to the scene and observing an operator and the passenger, and assuring the operator felt safe to transport, Mr. Jackson made the independent decision to allow

the operator to transport the customer. (Ex.8); (TR: 68, 140-141). Jackson further testified that he made this decision based upon his “own personal observations and judgment call on the scene as the supervisor.” (TR: 68) (emphasis added).

Any time a route is stopped or halted, the Road Supervisor is required to contact Hyattsville/OCC to notify them that the route is out of service. (TR: 69-70). Once Road Supervisors make their determination whether to put the operator back into service or not, they notify Hyattsville/OCC of their decision. (TR: 70). For example, regarding the September 5th incident, Brian Jackson testified that he made the determination to place the driver back into service and he notified Hyattsville/OCC of his decision. (TR: 70). Jackson further testified that in the year he has been employed by Veolia, he has decided to place an operator back into service or take an operator out of service more than twenty (20) times and has never been overruled by Hyattsville/OCC regarding such determinations. (TR: 71). Jackson testified:

So when there's a stoppage in service at any time, I, as the Road Supervisor, when I got out on a scene such as this and its determine if its preventability or if such a – if an operator will go back in service or will be taken out of service, you know, by policy, WMATA rules, I have to call, alert them (Hyattsville/OCC) via two-way radio that we would issued by my Employer Veolia, or ---in this case, Veolia for this purpose, and let them know that a certain operator is either in or out of service, and they went on my call, period. They don't have any say about what I determine because I'm the Road Supervisor.

(TR: 73).

Additionally, Road Supervisors will fill out an incident report even when they are not called by dispatch to respond to an incident. (TR: 74). Road Supervisors have the autonomy to prepare an incident report based upon observations of operators while on the road. (TR: 74). If a Road Supervisor observes an operator violate a policy or procedure they will approach the operator to coach and counsel the operator as well as prepare an incident report if necessary. (TR: 74). As Jackson testified:

we monitor the streets and so we might see something even when we're not on a call that we're able to go and we're able to approach any driver and say, hey, this is wrong, this is out of service, and then it becomes an incident or accident. So might not even get a call. We might be at a place and see a driver back into somebody or hit somebody, you know what I mean. And now we've become the initiators, and we let everybody know that this is what has happened. That's what happens sometimes because we always all over the place, and for the most part, **we have the autonomy to say, you know, to initiate those types of incidents and make those kinds of judgments based on what we see**

(TR: 74). (emphasis added).

Road Supervisors make conclusions regarding whether a policy or procedure has been violated in their incident reports and have the authority to recommend discipline or retraining. (TR: 183). Once a Road Supervisor fills out an incident report, the report is submitted to the Operations Director and possibly the Safety Manager for their final decision whether to discipline or retrain an operator based upon the information and recommendation provided in the incident report. (TR: 83-84; 165).

D. Use of Road Observation Reports

Another significant duty of the Road Supervisors is their obligation to observe and evaluate operators while they are performing their duties during their schedule routes. (TR: 75; 178-9); (Ex.10). Road Supervisors are responsible for observing operators' behavior and to ensure that Veolia and WMATA policies and procedures are followed by the operators. (TR: 75; 179); (Ex.10). The Road Supervisor job duties specifically require Road Supervisors to conduct "on-road observations of service to insure proper implementation of all operating rules and procedures." (Ex.10). In essence, Road Supervisors' purpose is to enforce Veolia and WMATA policies and procedures during the observations. (TR: 75; 179). Road Supervisors utilize and prepare Road Observation reports to evaluate the performance of the operators and to ensure that operators understand how to properly perform their jobs pursuant to Veolia and WMATA policy

or procedure. (TR: 81; 179). The Road Observation reports include the Road Supervisor providing the date of the observation, the location of the observation, the operator's name, the route the operator was performing, the van number of the vehicle the operator operated at the time, the operator's driver's license number, the operator's Department of Transportation medical card expiration date, the operator's division, as the time of the observation began and ended. (Ex. 9). In addition, the Road Supervisor is required to observe and determine whether the operator's performance in eleven separate categories was satisfactory or unsatisfactory. (Ex. 9). At the bottom of the page, the Road Observation reports contain a "comments" section where Road Supervisors include any comments or further statements regarding the operator's performance they deem appropriate. (TR: 81).

In addition, Road Supervisors will include within the "comments" section of the Road Observation report conclusions regarding policy violations as well as state whether they coached and counseled the operator as a result. (Ex. 9); (TR: 82-83; 183). The Road Supervisors job duties require Road Supervisors to conduct operator evaluations as well as "discipline and re-training." (Ex.10). Road Supervisors also have the authority and discretion to determine when to merely verbally coach and counsel an operator or whether to document that an operator received such discipline. (TR: 82-83; 180-181); (Ex.10). For example, Road Supervisors Mr. Jackson and Mr. Holtz testified that there are instances in which they will merely verbally coach and counsel an operator instead of documenting the discipline in their Road Observation reports. (TR: 82-83; 180-181). Mr. Jackson testified that he will merely verbally counsel if the operator violates a minor policy and he knows the operator is inexperienced. (TR: 79-80). Specifically, Jackson testified:

When I approach a driver . . . one of the first questions I asked is how long have you been driving, you know, how long you been a driver because I know a lot of

them, we train a lot of drivers and we release a lot of drivers week to week, and I don't know the new and who's not, and sometimes if there's a driver that's, you know, that's been out there, that's their fourth day, and they're doing everything right but they forgot to put their cone out, I might even assist them putting the cone out and I'll coach and counsel with them and just say, hey, listen, next time make sure you always put your cone out.

(TR: 80).

Similarly, Road Supervisor, Mr. Holtz testified:

I normally look at the severity of the violation and then I look at the driver, too. You know if its someone brand new, a new driver that might not be familiar with what's going on, usually I'll verbally counsel that driver, talk to them, show them the correct way of doing it.

(TR: 180). Further, Mr. Jackson testified that he has issued an excess of one-hundred (100) verbal counseling to operators as a result of observing operators being unsafe.

If a serious policy violation is observed by a Road Supervisor, they have the authority to discipline an operator by coaching and counseling the operator and documenting such discipline in the "comments" section of the Road Observation report. (TR: 82-83; 180-181). For example, Mr. Jackson prepared a Road Observation on August 3, 2014, in which the operator did not perform the door-to-door procedure properly. (Ex.9). After observing and documenting the improper door-to-door procedure, Mr. Jackson coached and counseled the operator and documented the discipline in the "comments" section by stating, "Door to door not performed properly due to cancellation . . . **counseled the operator.**" (Ex. 9); (TR: 82). When such documentation of a policy violation occurs within a Road Observation report, this is part of the disciplinary process for Veolia as these reports are placed in the operator's personnel file (TR: 78; 181). In addition, pursuant to the Collective Bargaining Agreements between Veolia and ATU, Local 1764 and Teamsters, 639, such verbal and written warnings and/or reprimands are

part of the progressive disciplinary process. (Ex. 1); (Ex. 2); (TR: 196-97). As Mr. Holtz testified regarding Road Supervisors' coaching and counseling:

Yes, I believe, I believe that the first part of it, it sorts of send a message to the operator that, you know, this is a warning, you know. **You've got to make sure it's done correctly. If not there are other, there are other repercussions down the road.**

(TR: 197) (emphasis added). Similarly, Mr. Jackson also testified that he has disciplined or recommended discipline of operators more than twenty-five (25) times since he became employed as a Road Supervisor with Veolia. (TR: 130).

Moreover, Road Supervisors have the authority to recommend that an operator be retrained based upon their observation and evaluation of an operator. (TR: 84). The Road Supervisor job duties specifically require Road Supervisors to "effectively recommend retraining, discipline, or retention based on the road observations." (Ex.10). For example, Brian Jackson testified that he recommended an operator be retrained in an observation report because the operator did not properly secure the customer's wheelchair as required. (TR: 84-85). Mr. Jackson specifically addressed Road Supervisors ability to recommend restraining by testifying:

Well, you've got to realize we're the eyes and ears of the entire operation. Nobody else but road supervisors on the road and drivers, right. So if we're out on the scene, and I see something, there's – nobody's going to really question too much of what I see as a supervisor. I want everybody to understand that. So when I'm out there, if I see somebody violating something, as a supervisor, I have every right to say this person isn't doing anything right. **If he's not doing anything right, I can call Hyattsville OCC, whoever you want to call, and I can say, this person needs to come out for training. I can let safety know, even the safety director know this person needs to be retrained, and if I feel like it's something that I could do right then, that's fine, but if it's something that's egregious enough that they need to be taken out of service, I can take them out of service with no questions asked, and they can go back to the base for that day and, you know, and then Pat (Safety Director) will initiate whatever the retraining process is.**

(TR: 92).

Road Supervisors may also effectively conduct retraining themselves if they observe an operator performing their job improperly. (TR: 85). Mr. Jackson further testified that at times, if an operator is inexperienced and he believes that an operator needs to be retrained, he will retrain the operator at the scene. (TR: 85). Mr. Jackson specifically testified:

So if I see somebody, especially the same driver who it might be their fourth day, and they didn't secure it [wheelchair] properly, you know what I'm going to do? . . . I'm going to take them out of service. I'm going to show them how to do it right, so the retraining is not necessarily a go back to the base and take you out of service situation. Retraining could be like right there, you know.

(TR: 85)³. Therefore, Road Supervisors have a the authority to not only recommend retraining if they believe it to be necessary, they also have the authority to remove an operator from service and conduct restraining at the scene.

Road Supervisors also utilize the Road Observation reports to provide positive feedback and praise to operators that perform their duties well. (TR: 86; 179). Road Supervisors will provide positive feedback to operators in order to boost morale while operators are on the road with the hope the praise will incentivize the operators to continue to perform their jobs in a proper manner. (TR: 180). For example, Mr. Jackson testified that if the operator is exemplary in specific areas he will put in the "comments" section of the Road Observation positive feedback such as, "excellent door-to-door," "excellent personality," "excellent attitude." (TR: 87). Whether the Road Supervisor disciplines an operator in the Road Observation Report or documents positive feedback, all Road Observations are reviewed by the Road Supervisor with the operator who was evaluated and the operator is required to sign the Road Observation. (Ex. 9); (TR: 86-87).

³ Mr. Jackson further testified that in the year that he has been employed with Veolia, he has retrained operators at the scene or on the road in more than ten (10) separate occasions. (TR: 86).

E. Use of Accident Folder Checklist

Road Supervisors prepare the Accident Folder Checklist when they respond and investigate accidents for Veolia. (TR: 57; 184-85). Upon responding to an accident, Road Supervisors are responsible for investigating and determining the preventability of an accident that occurs where a Veolia employee is involved. (Ex. 7; 10; 13); (TR: 57-58; 187). The Road Supervisor job duty states Road Supervisors are required to complete accident investigations and “effectively recommend remedial re-training, discipline as necessary.” (Ex.10). Once a Road Supervisor responds to an accident, they obtain information from every possible witness, including information from law enforcement. (TR: 184-186). The Road Supervisor prepares the accident report which contains his/her detailed observations of the accident based upon his/her observations of the damage to the vehicles, information provided from witnesses, and information obtained from law enforcement. (Ex. 13); (TR: 186). Road Supervisors also obtain a statement from the operator in order provide the operator the opportunity to tell their side of the story. (Ex. 13); (TR: 186). Road Supervisors are then required to draw a diagram depicting how the accident took place and how the vehicles were placed after the accident. (TR: 186-87). After Road Supervisors collect all the possible facts available at the time, they are required to determine the preventability of the accident. (TR: 57; 187). At times, Road Supervisors will conduct follow-up interviews of witnesses and include that information in the Accident Folder Checklist. (TR: 190). Road Supervisors make this preventability determination based upon the facts and their observations of the accident. (TR: 57; 187-88). Therefore, Road Supervisors are determining fault based upon their own observations of the accident scene and information collected.

Once the Accident Checklist Report is completed, all information including the Road Supervisors preventability determination is submitted to the Safety Department for the Safety Director's review. (TR: 191). The Safety Director can overrule the Road Supervisor's preventability determination if additional information that was not available at the time the Road Supervisor made his/her determination calls for such a change. (TR: 59; 190-91). The Employer notes that, while there are times a video recording may exist that could corroborate/verify the Road Supervisor's determination of preventability, such video is not downloaded or reviewed before the Road Supervisor completes his investigation and makes his determination of preventability. (TR: 59-60; 190-91). In instances where the accident is deemed preventable /chargeable, and no video of the accident exists, the Road Supervisors reports can lead to further disciplinary action by the employer if it has been determined by the Road Supervisor that an accident was preventable. (TR: 59-60; 190-91).

F. Authority to Remove an Operator from Service.

A significant part of the Road Supervisor position is the ability to remove an operator from service if the Road Supervisor deems it necessary. (TR: 61; 182; 191). Road Supervisors have the authority to remove an operator from service for a variety of policy, procedural, as well as safety reasons such as violating the door-to-door policy, uniform policy, unsafe vehicle maneuvering, or violation of the drug and alcohol policy. (Ex.10); (TR: 62; 182). The Road Supervisor job duties specifically require Road Supervisors to "maintain the ability to remove operator from schedule if the operator does not meet the fit for duty requirements." (Ex.10). For example, under WMATA's reasonable suspicion policy (drug and alcohol policy), if a Road Supervisor determines he/she has a reasonable suspicion that an operator is under the influence

of drugs or alcohol, the Road Supervisor has the authority to remove the operator from service. (TR: 102; 104-05).

In order to make such determinations, Road Supervisors observe operator's behavior, speech pattern, odor, color of the eyes, as well as any other possible signs that an operator may be under the influence of drugs or alcohol. (TR: 104). Based on their observations, Road Supervisors make the decision to remove the operator out of service to be tested for drugs or alcohol.⁴ (TR: 104-05). In fact, during the hearing, Mr. Holtz testified that he once removed an operator because he believed the operator had consumed alcohol and he testified that he [Road Supervisor Holtz] alone made the determination that the operator was not fit to perform his duties. (TR: 177). Once an operator has been taken out of service due to the Road Supervisor's reasonable suspicion, the operator is placed on administrative suspension until the results of the drug and alcohol test are returned to Veolia. (TR: 177).

Additionally, Road Supervisors have the authority to remove an operator based on their discretion for unsafe acts in a vehicle. (TR: 191-92). Road Supervisor Holtz testified that Road Supervisors have the authority to remove an operator for making a U-turn in the MetroAccess van as such a maneuver is a very serious and dangerous act. (TR: 192). The Veolia policy against making such maneuvers does not require or mandate that a driver be taken out of service for such unsafe acts; however, Road Supervisors, such as Mr. Holtz, use their own discretion and judgment to determine whether to remove operators from service for such dangerous acts in MetroAccess vehicles. (TR: 192). Road Supervisors even have the authority to prevent an operator from going into service if the Road Supervisor observes an operator not wearing the

⁴ Once a Road Supervisor detects that an operator may be under the influence, they are required to notify the Safety Department in order to prepare paperwork for the drug tests. Road Supervisors also notify Dispatch in order to have the operator's route covered by another operator. (TR: 103; 176-177).

proper Veolia operator uniform.⁵ (TR: 201). Mr. Holtz testified that Operators are required to wear their blue uniform shirts, a safety vest, dark blue trousers, and rubber black soled shoes while on duty. (TR: 200-01). If an operator does not have on the proper uniform, especially the safety vest, Road Supervisors may either prevent an operator from going out into service or remove the operator from service. (TR: 201). Again, in the event a Road Supervisor removes an operator from of service, when this occurs, the operator is removed from the clock and no longer receives their hourly rate for the remainder of the regularly scheduled shift. (TR: 116). Road Supervisors exercise independent judgment and discretion when determining when exercising their authority to remove an operator out of service.

G. Road Supervisors Reward Operators.

Road Supervisors are tasked with rewarding operators that provide good services to MetroAccess customers. (TR: 192). Veolia implemented a reward program called the Safety Blitz message in which an operator may be rewarded a twenty-five (\$25) dollar gift card by a Road Supervisor if the operator perform their duties properly. (TR: 192). If a Road Supervisor believes an operator has performed exceptionally during an observation, the Road Supervisor may provide the operator with Safety Blitz question. (TR: 192). Once the Road Supervisor provides the operator with the Safety Blitz question, the operator must then provide the correct answer to receive the twenty-five (\$25) dollar gift card. (TR: 192). Thus, the Road Supervisor's Road Observation of the operator determines whether the operator is eligible to receive the reward, but the operator must also remember and correctly provide the safety message of the day. (TR: 192-94). For example, at hearing Mr. Holtz testified:

⁵ Mr. Holtz testified that once a Road Supervisor removes an operator from service due to not wearing the appropriate attire, they merely contact the dispatch supervisor so that the operator's route can be distributed to another operator. (TR: 203). The decision to remove the operator from service due to not wearing the proper uniform is solely upon the discretion of the Road Supervisor. (TR: 203).

I had a driver last week, I had one gift card left that I wanted to give out, and I said I know this driver is going to get this gift card, and no sooner than the driver pulled up, the first thing I see, he didn't have his, he didn't have his vest on. So that eliminated him from getting the gift card already.

(TR: 193). Thus, Road Supervisors determine whether an operator is eligible to receive the twenty-five (\$25) gift card through their Road Observations. (TR: 192-94).

H. The Hot List

As part of Road Supervisors duties to observe, evaluate, and enforce Veolia and WMATA policies, Road Supervisors are provided a "Hot List" of the top ten (10) to twenty (20) operators who have the most policy violations. (TR: 198). On the "Hot List," Road Supervisors are provided with the name of the operator, the type of previous violations, and the operator's vehicle number. (TR: 198). Road Supervisors are instructed to specifically observe and pay closer attention to the operators on the "Hot List" in order to determine if they are continuing to commit similar policy violations. (TR: 198). Managers and supervisors are the only employees within the facility that are provided a copy of the "Hot List." (TR: 198).

I. Testifying on Behalf of the Employer.

Along with enforcing policy and procedure, investigating incidents and accidents, and issuing discipline to operators, Road Supervisors are also required to testify on behalf of the Employer at arbitration and other legal proceedings. (Ex.10); (TR: 105-07; 198-99). For example, Mr. Jackson testified that he appeared and testified at a discharge arbitration of an operator named Henry Chancler where Mr. Jackson's incident report directly lead to the termination of the operator. (TR: 105-07). Mr. Jackson was required to attend and testify on behalf of the Employer regarding his investigation and report because the operator questioned his incident report. (TR: 105-07). Similarly, Mr. Holtz testified that he testified at an unemployment hearing on behalf of the Employer where a terminated operator questioned Mr. Holtz's accident

preventability determination. (TR: 199). In this hearing, Mr. Holtz investigated an accident and determined that the accident was preventable. (TR: 199). As a result of Mr. Holtz's determination, the operator's employment was terminated. (TR: 199). During the unemployment hearing, the operator challenged Mr. Holtz's accident report and preventability determination. (TR: 199). As a result, Mr. Holtz was called to testify on behalf of the Employer and had to defend his investigation and his determination that the accident was a preventable accident. (TR: 199).

J. Road Supervisors Operate MetroAccess Vans

Lastly, as part of their duties, Road Supervisors at times are called upon to operate a MetroAccess van which is strictly driven by operators. (Ex.10); (TR: 124). Road Supervisors may be required to operate a MetroAccess van when Veolia is short staffed and/or when a driver is taken out of service due to an accident, incident, or injury. (TR: 124). When these events occur, Road Supervisors are obligated to operate the MetroAccess van. (TR: 124).

IV. DISCUSSION

A. Applicable Legal Principles of Supervisors Under the Act.

Section 2(11) of the Act defines "supervisor" as:

an individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the forgoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

29 U.S.C. § 152(11). The possession of any one of the indicia specified in Section 2(11) is sufficient to confer supervisory status, as long as the authority is carried out in the interest of the employer and requires the exercise of independent judgment. *Arlington Masonry Supply, Inc.*, 339 NLRB 817 (2003). "Failure to exercise authority does not negate supervisory status because

possession rather than exercise of supervisory authority determines supervisory status.” *Westwood Health Care Center*, 330 NLRB 935, 938 (2000). Stated slightly differently, it is the existence of the supervisory power that determines whether the individual is a supervisor under the Act, not whether the individual actually has exercised that power. *Arlington Masonry Supply, Inc.*, 339 NLRB at 818.

Thus, applying the foregoing definition, individuals are supervisors if “(1) they hold the authority to engage in any 1 of the 12 supervisory functions listed in Section 2(11); (2) their exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment; and (3) their authority is ‘held in the interest of the employer.’” *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 713 (2001). An individual’s supervisory status can be established if the putative supervisor has the authority to either perform a supervisory function or **to effectively recommend a supervisory function**. The burden of establishing supervisory status rests upon the party seeking to assert the status. *Dean & DeLuca New York, Inc.*, 338 NLRB 1046, 1047 (2003).

B. The Road Supervisors Are Statutory Supervisors Under Section 2(11) of the Act Because They Discipline and Effectively Recommend Discipline of Operators

The Board clearly has established that an individual or class of individuals constitute a supervisor under Section 2(11) if the employees have the authority to effectively recommend discipline. *Progressive Transportation Services, Inc.*, 340 NLRB 1044 (2003); *see also Mountaineer Park, Inc.*, 343 NLRB 1473, 1474-1475 (2004). Under this standard, an individual is a supervisor when they initiate the disciplinary process based on their own independent judgment, without an independent investigation being conducted by the employer’s upper management. *Id.*

In *Progressive Transportation Services*, the employer provided public transportation services and the union sought to represent the dispatchers. The dispatchers worked in a dispatching center, referred to as the “deck.” One of the individuals the union sought to represent was the “deck lead supervisor,” who, in addition to performing regular dispatching functions, also prepared and issued discipline notices to the dispatchers. The Board found the deck lead supervisor had the authority to effectively recommend discipline under Section 2(11) because she initiated the disciplinary process. Specifically, and of particular relevance to the instant case, the deck lead supervisor did not prepare the discipline notices independently, but brought employee disciplinary concerns to the attention of her manager, the Operations Manager, who decided the level of discipline based upon the supervisor’s report and recommendation. *Id.* at 1045-1046. The Board noted that “even if [the deck lead supervisor] does not issue discipline entirely on her own, she uses independent judgment to effectively recommend discipline.” *Id.* at 1045.

Furthermore, the Board held that the deck lead supervisor “effectively recommends discipline to [the Operations Manager] when she brings rule infractions and misconduct to [the Operations Manager’s] attention, thereby initiating the discipline process.” *Id.* In addition, the Operations Manager did not thereafter conduct an independent investigation of the incident in question. The Board also found that the deck lead supervisor was a Section 2(11) supervisor because the Operations Manager generally followed the supervisor’s recommendations without performing his own independent investigation. *Id.* In fact, the Board relied on the fact that when the deck lead supervisor brought a potential disciplinary issue to the Operations Manager’s attention, discipline thereafter ensued. Based on these facts, which are similar as in the instant case, the Board concluded the deck lead supervisor was a Section 2(11) supervisor under the Act.

In *Mountaineer Park, Inc.*, the Board found that individuals classified as assistant supervisors were Section 2(11) supervisors because they were authorized to write recommendations for disciplinary action. Even though the disciplinary recommendations were reviewed and approved by upper management, the manager had a policy of merely “signing off” on recommendations if they were justified, without conducting an independent investigation. *Id.* at 1474. The Board found that “if the assistant supervisor brought a disciplinary matter to the attention of management, discipline would ensue, demonstrating that the assistant supervisors’ disciplinary recommendations were effective.” *Id.* at 1475. The Board further found it to be significant that the assistant supervisors effectively recommended discipline because they had the authority to bring employee rule infractions and misconduct to the Director of Housekeeping’s attention, “thereby initiating the disciplinary process.” *Id.* at 1474.

Similarly, in *Starwood Hotels & Resorts Worldwide, Inc.*, 350 NLRB 1114 (2007), the Board found that the Front Desk Supervisor was a supervisor under the meaning of the Act based upon the Front Desk Supervisor’s authority to effectively recommend discipline. *Id.* The Board reached this conclusion as to supervisory status based on the fact the Front Desk Supervisor initiated disciplinary action through coach and counsel sessions of an employee and made a recommendation that the employee be harshly disciplined after he repeatedly coached the employee about treating hotel guests rudely. *Id.* at 1116-1117. The Manager then accepted the Front Desk Supervisor’s report of the incident without conducting his own independent investigation and issued discipline against the employee based on the Front Desk Supervisor’s report. *Id.*

In addition, in order to effectively recommend discipline, the Board in *ITT Lighting Fixtures*, 265 NLRB 1480 (1982), to support a claim that individuals had the authority to

effectively recommend discipline, the party asserting the supervisory status must establish the supervisors: (1) submit actual recommendation; (2) their recommendations are followed on a regular basis; (3) the disciplinary incidents are not independently investigated by superiors; and (4) the recommendation results from the supervisor's own independent judgment. Here, it is clear that Veolia's Road Supervisors not only have the authority to discipline and/or initiate the disciplinary process by issuing verbal and written discipline to operators, they also effectively recommend discipline.

1. Road Supervisors Directly Issue Discipline to Operators.

Veolia's Road Supervisors are "supervisors" within the meaning of Section 2(11) of the Act because they are authorized to directly issue discipline. Here, the evidence adduced at hearing establishes that (1) counseling and coaching constitute discipline, (2) the Road Supervisors are authorized and actually do directly discipline operators by issuing counseling and coaching in the field, and (3) Road Supervisors' ability to remove an operator from service is discipline.

Specifically, the uncontroverted evidence presented at hearing overwhelmingly establishes that coaching and/or counseling is the first step of the progressive disciplinary process and constitutes discipline. Pursuant to Sections 10.2 of the Collective Bargaining Agreements Veolia has entered into with the ATU, Local 1764 and Teamsters, Local 639, verbal and written warnings are the first step of the progressive disciplinary process. (Ex. 1); (Ex. 2); (TR: 196-97). The ATU, Local 1764 Collective Bargaining Agreement entered into by Veolia specifically states:

Any violation of posted and/or written Company rules, policies and/or procedures may result in disciplinary action. With exception as listed under "Serious

Infractions” below, and the attendance policy, and posted and/or written Company rules, policies, and/or Procedures may result in the following disciplinary action.

First violation: Policy review documented verbal counseling.

Second violation: First Written Warning Notice.

Third Violation: Second Written Warning Notice

Fourth Violation: Suspension of May Result in Discharge from Company.

(Ex. 2); (TR: 196-97) (emphasis added).

Similarly, the Teamsters, Local 639 Collective Bargaining Agreement entered into by Veolia states:

Disciplinary measures shall be taken in the following order:

- **Oral reprimand**
- **Written reprimand**
- Suspension, not to exceed five (5) days (notice to be given in writing).
- Discharge

The Company will generally follow this four-step process for most rule or policy infractions. The Employer’s focus will be to improve the employee’s performance and retain a qualified, trained, and valuable employee.

(Ex. 1); (TR: 196-97) (emphasis added). Thus, the Collective Bargaining Agreements of the two Unions that are the exclusive bargaining representatives of the operators acknowledge the verbal coaching and counseling issued to operators by a Road Supervisors as discipline.

As Mr. Jackson and Mr. Holtz testified during hearing, when an operator receives coaching and counseling from a Road Supervisor they are fully aware that they are being disciplined (TR: 77; 197). Mr. Holtz specifically testified that the verbal counseling he issues to an operator initiates the disciplinary process because it is the first step in the process pursuant to the collective bargaining agreements that govern the relationship between the operators and the Company. (TR: 197). In fact, he further testified that operators are aware that further violations will lead to more severe discipline down the road. (TR: 197). When out on the road, what a Road Supervisors says goes, as Mr. Jackson testified during the hearing. (TR: 77). The fact that the unions that represent the operators acknowledge the authority of the Road Supervisors’ ability to

verbally coach and counsel operators in their collective bargaining agreements clearly supports the Company's position that Road Supervisors are true supervisors under the meaning of the Act.

In addition to Road Supervisors having the authority to discipline pursuant to the collective bargaining agreements, Road Supervisors actually exercise this authority by issuing coaching and counseling to operators verbally or in writing by documenting the discipline. The Road Supervisors job duties require Road Supervisors to conduct operator evaluations as well as "discipline and re-training." (Ex.10). When a Road Supervisor observes an operator committing a violation of Veolia or WMATA policy or procedure, the Road Supervisor will coach and counsel the operator and document the counseling. (TR: 82-83; 180-181). For instance, Mr. Jackson prepared a Road Observation on August 3, 2014, in which the operator did not perform the door-to-door procedure properly. (Ex.9). After observing and documenting the improper door-to-door procedure, Mr. Jackson coached and counseled the operator and documented the discipline in the "comments" section by stating, "Door to door not performed properly due to cancellation . . . **counseled the operator.**" (Ex. 9); (TR: 82). Mr. Jackson also testified that he has disciplined or recommended discipline of operators more than twenty-five (25) times since he became employed as a Road Supervisor with Veolia. (TR: 130). Subsequent to a Road Supervisor coaching and counseling an operator and documenting the discipline in the Road Observation report, these reports are filed in the operator's personnel file (TR: 78; 181).

These facts clearly demonstrate Road Supervisors' unquestioned authority to discipline operators. The fact that such a report of counseling is not independently investigated by any superior, but is taken as true and placed in the operator's personnel file only strengthens the Company's position. Road Supervisors play a significant role in not only the initiation of the disciplinary process, but also in the overall disciplinary process. Without Road Supervisors

coaching and counseling these operators and documenting such discipline, the other members of management would be blind regarding which operators cannot perform their duties properly and should receive further discipline. Thus, consistent with applicable Board precedent, Road Supervisors have the authority to issue discipline.

Equally as important, the undisputed evidence presented at hearing establish Road Supervisors have the authority and discretion to determine when to merely issue a verbal coaching and counseling without documenting the discipline. (TR: 82-83; 180-181). Road Supervisors Mr. Jackson and Mr. Holtz testified that there are instances in which they merely verbally coach and counsel an operator instead of documenting the discipline in their Road Observation reports. (TR: 82-83; 180-181). Mr. Jackson testified that he will merely verbally counsel an operator if the operator violates a minor policy and the operator is inexperienced. (TR: 79-80). Specifically, Jackson testified:

When I approach a driver . . . one of the first questions I asked is how long have you been driving, you know, how long you been a driver because I know a lot of them, we train a lot of drivers and we release a lot of drivers week to week, and I don't know the new and who's not, and sometimes if there's a driver that's, you know, that's been out there, that's their fourth day, and they're doing everything right but they forgot to put their cone out, I might even assist them putting the cone out and I'll coach and counsel with them and just say, het, listen, next time make sure you always put your cone out.

(TR: 74).

Accordingly, the uncontroverted evidence demonstrates that when a Road Supervisor observes an operator violate a policy or procedure, the Road Supervisor will approach the operator to coach and counsel the operator. (TR: 74). Also, Road Supervisors will determine upon their own discretion when they will document the discipline within a Road Observation report. (TR: 74). Such use of discretion in determining when to document discipline is a perfect example of the Road Supervisors use of "independent judgment" as defined by the Supreme

Court in *Kentucky River*. 532 U.S. at 713. The Road Supervisors decision whether to document counseling is neither dictated by detailed instructions from management nor provided in the Company's policies or procedures. The Road Supervisors are clearly making their own independent decision regarding whether a violation is severe or minor and are taking into consideration outside factors such as the experience of the operator. The Union presented no evidence that such decisions are routine or that Road Supervisors are required by management or policy to not document counseling. Road Supervisors make the decision whether to document counseling based upon their own independent discretion and judgment.

In addition, Road Supervisors have the authority and exercise the authority to remove an operator from service for violations of Veolia and WMATA policies. (TR: 62; 182). Mr. Jackson testified that under WMATA's reasonable suspicion policy (drug and alcohol policy), if a Road Supervisor has a reasonable suspicion that an operator is under the influence of drugs or alcohol, the Road Supervisor has the authority to remove the operator from service. (TR: 102; 104-05). Road Supervisors make this determination by observing an operator's behavior, speech pattern, odor, color of the eyes, as well as any other possible signs that an operator may be under the influence of drugs or alcohol. (TR: 104). Road Supervisors make the decision to remove the operator out of service to be tested for drugs or alcohol. (TR: 104-05). During the hearing, Mr. Holtz testified that he removed an operator because he believed the operator had consumed alcohol and **he alone made the determination that the operator was not fit to perform his duties**. (TR: 177). Also, once an operator is removed from service due to the Road Supervisor's reasonable suspicion, the operator is placed on **administrative suspension** until the results of the drug and alcohol test are returned to Veolia. (TR: 177).

To make such a determination, Road Supervisors have to rely upon their training, personal experiences, and independent judgment regarding whether an operator is under the influence of drugs or alcohol. There is nothing routine or clerical regarding a Road Supervisor having to observe each operator he/she comes into contact to ensure the operator is fit for duty. Each time a Road Supervisor comes into contact with an operator, the Road Supervisor must be alert and use their independent judgment or discretion to determine whether an operator is behaving oddly or operating the vehicle improperly which leads the Road Supervisor to believe that the operator is under the influence. This is no easy task and the training Road Supervisors receive in no way eliminates the independent judgment necessary to determine whether an operator is under the influence. While Road Supervisors have been trained to recognize the signs of an unfit operator, each day Road Supervisors must go out on the road and use his/her judgment to determine whether operators are safe to perform their duties. There is nothing routine about these occurrences for Road Supervisors.

Moreover, testimony presented at hearing established that Road Supervisors have the authority to remove an operator for unsafe acts in a vehicle if they deem it necessary. (TR: 191-92). Road Supervisor Holtz testified that Road Supervisors have the authority to remove an operator for committing unsafe acts in a MetroAccess van such as a U-turn. (TR: 192). The Veolia policy against making such maneuvers does not require that an operator be taken out of service for such unsafe acts; however, Road Supervisors use their own discretion and judgment to determine whether to remove operators from service. (TR: 192). Lastly, Road Supervisors even have the authority to prevent an operator from going into service or can remove an operator from service if the Road Supervisor observes an operator not wearing the proper Veolia operator uniform. (TR: 201). When a Road Supervisor removes an operator from service, the operator

does not receive their hourly wage for the remainder of their scheduled shift. (TR: 116). Thus, such a removal is clearly disciplinary in nature similar to a suspension.

A Road Supervisor removing an operator for unsafe acts is clearly an exercise of independent judgment necessary to establish supervisory status under the meaning of the Act. Such a removal is not pursuant to a Veolia or WMATA policy and is strictly a judgment call made by the Road Supervisor who witnessed the unsafe act. The record is clear that such removal are not reviewed, second guessed, or investigated independently by another member of management. In fact, Mr. Jackson made it very clear in his testimony that when he decides to remove an operator, it's his decision to make as he and other Road Supervisors are the eyes and ears of management and are the only supervisors who are able to make such decision on the road. (TR: 74; 92).

In accordance with the foregoing, the Employer's uncontroverted evidence establishes that Road Supervisors hold and actually exercise the authority to directly issue discipline.

2. Road Supervisors Effectively Recommend Discipline.

The evidence presented at hearing establishes that, through incident reports, Road Observation reports, and the Accident Checklist, Road Supervisors (1) are responsible for observing, investigating, identifying and reporting operators' violations, and submitting actual recommendations (2) these recommendations are followed, (3) the disciplinary incidents are not independently investigated, and (4) those reports directly leads to discipline and are the sole basis of same.

First, as detailed above, Road Supervisors are responsible for observing, investigating, identifying and reporting operators' violations or commendable acts and submitting actual recommendations. (Ex.7; 8; 9; 10); (TR: 117; 129; 173-174; 177-178). Each

Road Supervisor supervises every operator in the zone in which he or she is working during a given shift. (TR: 52; 178-179). Road Supervisors have been trained on the Company's rules, policies, and procedures and are responsible for monitoring, investigating and determining whether operators are violating or exceeding the Company's expectations as it concerns those rules, policies, and procedures. (TR: 99-102; 174-75). In fact, Road Supervisor Thomas Holtz testified that when he is out on the road, he will observe any operator and counsel any operator if they are not performing their job safely regardless whether the operator is employed by Veolia, First Transit, or Diamond Transportation. (TR: 179).

The importance of the Road Supervisors' role within the operations is best described by Mr. Jackson's testimony in which he stated:

we monitor the streets and so we might see something even when we're not on a call that we're able to go and we're able to approach any driver and say, hey, this is wrong, this is out of service, and then it becomes an incident or accident.

(TR: 74). Mr. Jackson further elaborated by stating, "**we have the autonomy to say, you know, to initiate those types of incidents and make those kinds of judgments based on what we see . . .**" (TR: 74).

In addition, pursuant to the Road Supervisor job duties, which each and Road Supervisor reviewed and accepted, Road Supervisors are required to complete incident reports "as required and effectively recommend remedial re-training, discipline as necessary." (Ex.10). Road Supervisors have the discretion to make conclusions regarding whether a policy or procedure has been violated in incident reports and Road Observations and have the **authority to recommend discipline or retraining.** (TR: 84-85; 183). Mr. Jackson testified that he has disciplined or recommended discipline of operators more than twenty-five (25) times since he became employed as a Road Supervisor with Veolia. (TR: 130). For instance, Brian Jackson testified that

he recommended an operator be retrained in an observation report because the operator did not properly secure the customer's wheelchair as required. (TR: 84-85). He further testified that when he wants an operator retrained based upon his observations, he will remove the operator from service, take them back to base, notify the Safety Director and she will initiate the retraining process. (TR: 92).

Recommendations such as the one testified to by Mr. Jackson are essential to the overall success of the Company's operations. Without recommendations for discipline and retraining from Road Supervisors as described by Mr. Jackson, the remainder of management would be unable to determine which operators' job performances warrant retraining or harsher discipline such as termination. The Road Supervisor job duty requires Road Supervisor to complete accident and incident investigations and **"effectively recommend remedial re-training, discipline as necessary."** (Ex.10). As Road Supervisor Jackson testified, Road Supervisors are the eyes and ears of the Veolia MetroAccess project and are required under their job duties to not only report infractions, but also to provide recommendations regarding discipline and retraining. (TR: 92); (Ex.10, *See Duty # 2*). Furthermore, Mr. Holtz testified that there are times in which other members of management will seek Road Supervisors out for their input and recommendation regarding an operator. (TR: 183). Disciplinary decisions are a collective effort with the Company and Road Supervisors play a vital role in the process with their recommendations.

Next, the recommendations made by the Road Supervisors are followed. The recommendations made by Road Supervisors regarding removal of an operator, discipline, or preventability of an accident are followed by management. During the hearing, Mr. Jackson specifically testified that he has never been overruled when he determined to

remove a driver from service. (TR: 116). When this occurs, the incident report or evaluation prepared by the Road Supervisor which documents the removal of the operator will be placed in the operator's personnel file. (TR: 116). Additionally, when a Road Supervisor documents that they coached and counseled an operator, these reports are placed in the operators personnel file without further investigation. (TR: 78; 181).

Moreover, when Road Supervisor recommends for an operator to be retrained, management regularly retrain the operator pursuant to the recommendation. Mr. Jackson when he wants an operator retrained based upon his observations, he will remove the operator from service, take them back to base, notify the Safety Director and she will initiate the retraining process. (TR: 92). Specifically addressing Road Supervisors ability to recommend retraining and management complying, Mr. Jackson stated:

I can let safety know, even the safety director know this person needs to be retrained, and if I feel like it's something that I could do right then, that's fine, but if it's something that's egregious enough that they need to be taken out of service, I can take them out of service with no questions asked, and they can go back to the base for that day and, you know, and then Pat (Safety Director) will initiate whatever the retraining process is.

(TR: 92). This clearly establishes that Road Supervisors not only have the authority to effectively recommend retraining, but they exercise this authority as demonstrated by Mr. Jackson's testimony.

In addition to the discipline, Road Supervisors also effectively recommend discipline based on accident reports and are regularly followed by management. After the Road Supervisor conducts his/her investigation, the accident report is submitted to the Safety Department. (TR: 191). The Employer notes that, while there are times a video recording may exist that could corroborate/verify the Road Supervisor's determination of preventability, such video is not downloaded or reviewed before the Road Supervisor completes his investigation and makes

his/her determination of preventability. (TR: 59-60; 190-91). In instances where the accident is deemed preventable/chargeable, and no video of the accident exists, the Road Supervisors' preventability determination are regularly upheld by management and can lead to further disciplinary action by the employer if it has been determined by the Road Supervisors that an accident was preventable. (TR: 59-60; 190-91). In fact, Mr. Jackson testified, while his preventability determination can be overruled by the Safety Director, in the year that he has been employed with Veolia he has yet to have one of his preventability determinations overturned. (TR: 59). This testimony clearly establishes that the preventability determinations made by Road Supervisors are regularly followed by management.

The Road Supervisors' recommendations regarding retraining, discipline, and accident preventability are regularly followed by management as the Road Supervisors' observations and judgment in the field are regularly the best information to make such determinations. Road Supervisors are the only supervisors on the road observing the operators as they perform their duties and management heavily relies upon Road Supervisors discretion, judgment, and ultimately their recommendations.

Next, disciplinary and retraining recommendations are not investigated by management. The evidence presented at hearing clearly established that management does not investigate Road Supervisors' recommendations of retraining or discipline. This was best established by Mr. Jackson's testimony regarding his ability to remove an operator from service, take them to base, recommend retraining to the Safety Director, and she will initiate the retraining process. (TR: 92). In this scenario, the Safety Director does not conduct any independent investigation into the facts or occurrence which brought about Mr. Jackson's recommendation to retrain; instead he testified that when such occurs she merely initiates the

training process. Therefore, when a Road Supervisor recommends retraining based upon their observations, management takes their observations as true and conducts retraining based upon the recommendation.

Even more, regarding the Road Supervisors discipline or recommendation of discipline documented in a Road Observation report or incident report, the testimony presented at hearing clearly established that management does not conduct an independent investigation into the discipline or recommendation of discipline. (TR: 78; 181). It was testified to by both Company witnesses that subsequent to a Road Supervisor coaching and counseling an operator and documenting the discipline in the Road Observation report, these reports are filed in the operators personnel file (TR: 78; 181). Neither witness testified that when this occurs, management conducts an additional investigation into policy violation; instead the evidence established that the documentation of discipline is taken as true and goes into the operator's permanent personnel file. Even in an incident report where the Road Supervisor merely recommends discipline or retraining, the incident report is submitted to the Operations Director to make the final decision whether to discipline or retrain an operator, but the decision is made solely based upon the information and recommendation provided in the incident report. (TR: 83-84; 165). This evidence clearly establishes that the disciplinary and retraining recommendations are not independently investigated by management, but rather, the Road Supervisors recommendations are taken as true and regularly followed.

Finally, the incident reports, road observations, and accident reports completed and issued by Road Supervisors directly and independently lead to the Employer's issuance of discipline to operators. Significantly, and consistent with Board precedent on the issue, the Operations Director and Safety Director take the Road Supervisor's written description as set

forth in incident reports, Road Observation reports, and accident reports as true and complete, and issues discipline based on the Road Supervisor's version of facts and determinations as set forth in these reports. (TR: 59; 83-84; 165). As discussed above, when a Road Supervisor removes an operator from of service, the operator is taken off the clock and does not receive pay for the remainder of the shift. (TR: 116). Mr. Jackson testified that he has never been overruled when he determined to remove a driver from service. (TR: 116). When this occurs, the incident report or evaluation prepared by the Road Supervisor which documents the removal of the operator will be placed in the operator's personnel file. (TR: 116). Additionally, when a Road Supervisor documents that they coached and counseled an operator, these reports are placed in the operators personnel file without further investigation. (TR: 78; 181). As previously argued,

Furthermore, demonstrating the use of Road Supervisors' accident reports and determinations directly leading to discipline of an operator, Mr. Holtz testified that he appeared and testified on behalf of the Employer in an unemployment hearing where an accident report he prepared was the center of the dispute. (TR: 199). In the accident report, Mr. Holtz determined the accident was preventable which lead to the termination of the operator. (TR: 199). During the unemployment hearing, the operator challenged Mr. Holtz's accident report and determination that the accident was a preventable accident. (TR: 199). These facts alone, clearly demonstrate that the Road Supervisors accident reports directly and independently lead to discipline.

Based on the foregoing, the evidence presented at hearing demonstrates that Veolia uses the incident reports, road observation reports, and accident reports completed by Road Supervisors as an independent basis for the issuance of discipline, from coaching and counseling to termination. Accordingly, Veolia's Road Supervisors effectively recommend discipline and are "supervisors" within the meaning of Section 2(11).

C. Veolia has Also Established the Road Supervisors Are Statutory Supervisors Under the Act Because They Reward Operators

At the hearing, the uncontroverted testimony established that Road Supervisors can reward operators for their service through the issuance of the twenty-five (\$25) dollar gift card through the Safety Blitz program. If an operator is observed and evaluated by a Road Supervisor performing all the procedures properly, upon the Road Supervisors discretion, the operator can become eligible to receive the Safety Blitz gift card. (TR: 192). However, in order to receive the reward the operator must also remember the safety message for the day. (TR: 192). Thus, the Road Supervisor's Road Observation determines whether the operator is eligible to receive the reward, but the operator must also remember and correctly provide the Road Supervisor with the safety message of the day. (TR: 192-94). Thus, Road Operators have the discretion to provide rewards to operators based upon their job performance. (TR: 192-94).

D. Veolia's Road Supervisors Are Statutory Supervisors Under the Act Because They Responsibly Direct Operators.

Veolia's Road Supervisors are supervisors as defined under the Act because they responsibly direct operators regarding whether an operator can continue the route in the event of an incident. The Board in *Oakwood Healthcare, Inc.*, 348 NLRB 686, 690-91 (2006), held that the authority to "responsibly direct" employees is not limited to department heads. If a person has employees under them and can decide whether these employees perform certain tasks, that person is a supervisor provided that the direction is "responsible." *Id.* Thus, "direction" includes the authority to instruct employees how to perform jobs properly, correcting improper performance, and moving employees when necessary. *Croft Metals, Inc.*, 348 NLRB No. 38 (2006).

Direction is "responsible" if the person performing the oversight is accountable for others' performance of task, such that the adverse consequence may befall the one providing the oversight if the task is not performed properly. *Oakwood*, 348 NLRB at 691. However, for such

authority to be “responsible direction,” the supervisor must be held accountable for the job performance of the employee they oversee. *Id.* Here, Road Supervisors clearly provide direction to operators as they instruct operators when they are not performing their duties correctly, retrain operators upon their own discretion, and will remove operators from service if necessary. Road Supervisors can also be held accountable for their directions in the event their directions are not “responsible.”

The uncontroverted evidence presented at hearing clearly establishes that Road Supervisors direct operators by correcting improper performance, instructing operators how to perform their jobs properly, and removing operators from service when necessary. At hearing it was testified to that Road Supervisors not only have the authority, but exercise the authority to retrain operators who do not perform their duties properly. (TR: 85). The Road Supervisors’ purpose is to enforce Veolia and WMATA policies and procedures during their observations while on the road. (TR: 75; 179). If a Road Supervisor observed improper conduct, the Road Supervisor has the authority to couch and counsel, retrain, recommend retraining, or remove the operator if deemed necessary. (TR: 81-85; 92; 180-80; 191-92).

In addition, as part of their duties, Road Supervisors are called upon to make decisions regarding whether an operator may continue on their route as scheduled. (TR: 70). For instance, during a September 5th incident, Brian Jackson testified that he made the determination to place the driver back into service and he notified Hyattsville/OCC of his decision. (TR: 70). Jackson further testified that in the year he has been employee with Veolia, he has decided to place an operator back into service or take an operator out of service more than twenty (20) times and has never been overruled by Hyattsville/OCC regarding such determinations. (TR: 71). Such testimony clearly establishes that Road Supervisors have the authority to provide direction to

operators to ensure Veolia and WMATA objectives, safety of the operator and passenger, are upheld.

Road Supervisors can be held accountable for the performance of operators if there directions are not “responsible.” As discussed above, Mr. Jackson testified that he has put numerous drivers back into service based upon his independent judgment and discretion. (TR: 71). However, if Mr. Jackson or any Road Supervisor placed an operator back into service who should not have been in service because they were not fit for duty or for any other reason, the Road Supervisor can be held accountable for their direction. Road Supervisor’s job is to be the eyes and ears of the operation and is required to enforce Veolia’s and WMATA’s policies. The Road Supervisor job duties specifically require a Road Supervisor to insure operators are fit for duty at all times. (Ex. 14, See Duty #6). If a Road Supervisor is incapable of ensuring operators are safely transporting MetroAccess customers, the Road Supervisor would be held accountable and would face disciplinary action up to and including termination. Accordingly, the Board must find that Veolia’s Road Supervisors are supervisors as they “responsibly direct” operators.

The evidence presented at hearing clearly establishes that Road Supervisors use their own independent judgment when “reasonably directing” operators. The example provided above clearly demonstrates Mr. Jackson used independent judgment when determining whether to place the operator back into service. It was Mr. Jackson’s observation of the operator and the passenger that assured him the Operator could continue her route as scheduled after the incident. (Ex.8); (TR: 68, 140-141). Mr. Jackson made the independent decision to allow the operator to transport the customer. (Ex.8); (TR: 68, 140-141). Such use of discretion in determining when to remove or not to remove an operator from service is a perfect example of the Road Supervisors use of “independent judgment” as defined by the Supreme Court in *Kentucky River*, 532 U.S at

713. Accordingly, these facts merely strengthen the Company's position that Road Supervisors are supervisors under the meaning of the act because they "responsibly direct" operators as defined under *Oakwood Healthcare, Inc.*

E. Applicable Secondary Indicia of Supervisory Status of the Road Supervisors.

In addition to the indicia expressly listed under Section 2(11), non-statutory indicia can be used as background evidence in determining supervisory status. *See Training School of Vineland*, 332 NLRB 1412 (2000); *Chrome Deposit Corps.*, 323 NLRB 961, 963 (1997). While the board has held that secondary indicia alone does not establish supervisory status in the absence of the primary indicia set forth in 2(11), the Board has nonetheless held that secondary indicia such as supervisor to non-supervisor ratios and attendance at supervisory meetings bolster the primary indicia. *See Ken-Crest Services*, 335 NLRB 777, 779 (2001); *Marian Manor for the Aged & Infirm*, 333 NLRB 1084 (2001). The competent record evidence clearly establishes that Road Supervisors possess and exercise the authority to: (1) discipline or effectively recommend discipline; (2) reward employees; and (3) "responsibly direct" employees. As illustrated below the record evidence also establishes that a litany of secondary indicia exists supporting the Company's position that Road Supervisors are statutory supervisors under the Act.

1. Access

It is undisputed that Road Supervisors and other members of management have greater access to the interior of the Veolia facilities than operators. In the Hubbard Road facility, the Road Supervisors perform their office work within the Operations office within the Hubbard Road Facility. (TR: 48). Within the Operations office, Road Supervisors have access to a cubicle which is specifically assigned to Road Supervisors. (TR: 48). In addition, Road Supervisors are exclusively assigned a computer and file cabinets where they file documents such as employee

injury reports as well as their vehicle keys. (TR: 47-49). During hearing Road Supervisor, Brian Jackson testified that Road Supervisors have access to injury, medical, and worker's compensation reports of the operators in the Road Supervisors' cabinet located within the Operations Office. (TR: 50). Drivers/operators are not allowed within the Operations office unless allowed by a Road Supervisor another member of management. (TR: 55-56).

The fact that Road Supervisors have the same access to the Company's facilities as well as documents such as medical reports and worker's compensation reports of employees as managers clearly supports the Company's position that Road Supervisors are statutory supervisors as defined under the Act.

2. Uniforms

Lead Road Supervisors and Road Supervisors are required to wear a uniform which identifies them as supervisors. (TR: 199-200). Lead Road Supervisors and Road Supervisors are required to wear a white shirt, blue or black trousers, black boot like shoes with a rubber sole, and a safety vest. (TR: 200). Printed on the Road Supervisors' white uniform shirt in the left corner, is their title, "Road Supervisor." (TR: 200). In contrast, operators' uniform entails a blue shirt, blue trouser, black rubber soled shoes, and a safety vest. (TR: 200-01). The distinction in uniforms further emphasizes the Road Supervisors are held out to the public as supervisors as distinguished from the operators. The uniforms worn by the operators and the Road Supervisors clearly identify a distinction between the two job classifications as well as the supervisory status of the Road Supervisors.

3. Authority to Remove Operators From Service

Road Supervisors have the authority to remove operators from service based upon the Road Supervisors Discretion. (TR: 61-62; 182; 191). Under WMATA's reasonable suspicion

policy (drug and alcohol policy), if a Road Supervisor or has a reasonable suspicion that an operator is under the influence of drugs or alcohol, the Road Supervisor has the authority to remove the operator from service. (TR: 102; 104-05). Also, Mr. Holtz testified that Road Supervisors have the authority to remove a driver based upon their own evaluation of the driver's ability to be safe within the MetroAccess van. (TR: 192) For example, Road Supervisors have the authority to remove an operator for making a U-turn in the MetroAccess van. (TR: 192). The Veolia policy against making such maneuvers does not require or mandate the operator be taken out of service, but Road Supervisors use their own discretion and judgment to determine whether to remove operators from service for such acts. (TR: 192). The uncontroverted evidence established that Road Supervisors even have the authority to prevent an operator from going into service if the Road Supervisor observes an operator not wearing the proper Veolia operator uniform. (TR: 201). As testified by Mr. Jackson, when a Road Supervisor removes an operator from service that individual is taken off the clock, and therefore, does not receive payment for the remainder of their scheduled shift. (TR: 116).

The fact that the Road Supervisors can control whether an operator works clearly supports the Company's position that Road Supervisors are statutory supervisors as defined under the Act.

4. Access to Computers and Email

Road Supervisors can access a computer in the Operations Office so they can check company emails, perform research on company software, and do whatever other duties they need to perform their supervisory functions (TR: 47-48). Road Supervisors have their own Veolia email account and frequently receive email communications from other members of management (TR: 202-04). Operators do not have access to these computers or the software on the

computers, and they do not have Company email addresses (TR: 202-04). The fact that Road Supervisors are given access to Company software, have Company email addresses and are treated the same as managers in this respect further supports the Company's position that Road Supervisors are held out and actually are statutory supervisors as defined under the Act.

5. Supervisory Ratio

Currently the Company employs approximately six-hundred (600) operators and seventeen (17) Road Supervisors that work on the road at the Veolia MetroAccess facilities. That means that the current supervisory ratio is one (1) supervisor for every thirty-five (35) operators. If the Road Supervisors are deemed not to be supervisors under the Act, there would be no true statutory supervisors on the road to supervise 600 operators. (TR: 217). In *Pennsylvania Truck Lines*, 199 NLRB 641 (1972), the Board observed that "if strip supervisors and dispatchers were found to be nonsupervisory, there would be no more than three supervisors . . . at any of the employer's terminals, some of which have as many as 100 drivers, and there would be no supervisors at the terminals on weekends, when a dispatcher or strip supervisor is in charge." Where a proposed bargaining unit otherwise would be left without anyone in a supervisory capacity, the Board has relaxed its standards of exclusion to ensure maintenance of a minimum layer of supervision. *Salvation Army Williams Mem'l Residence*, 293 NLRB 944 (1989). Therefore, it is axiomatic that an examination of the supervisory ratio supports the Company's position that the Road Supervisors are supervisors as defined under the Act.

6. Road Supervisors' Access to Employee Information.

Road Supervisors have access to employee information such as medical reports and worker's compensation files. During hearing, Road Supervisor Brian Jackson testified that Road Supervisors have access to injury, medical, and worker's compensation reports of the operators

in the Road Supervisors' cabinet located within the Operations Office. (TR: 50). In addition, Road Supervisors are provided a list of the ten (10) to twenty (20) operators that have the most policy infractions, called the "Hot List," so that Road Supervisors will observe and evaluate these drivers while on the road to determine if they are continuing to commit similar infractions. (TR: 198). Managers and supervisors are the only employees within the facility that are provided a copy of the "Hot List." (TR: 198). The fact that Road Supervisors have access to medical reports, injury reports, worker's compensation reports, and the "Hot List" only further demonstrates their supervisory status pursuant to the Act.

7. View Themselves As Supervisors.

The competent record evidence clearly establishes that Road Supervisors consider themselves to be supervisors under the Act. The best example that Road Supervisors consider themselves to be supervisors is the testimony from Mr. Jackson where he stated:

I'm the supervisor, you know, I'm the one. So I mean they, you know, when I come on the scene and they see me come on the scene and they see – and I approach them, I approach them in a supervisory role, so they know that whatever I say, you know, goes.

(TR: 77).

Clearly, Mr. Jackson and Mr. Holtz view themselves as supervisors as they testified to their ability to discipline, remove, retrain, and reward operators based upon their discretion. Both witnesses testified to their ability use discretion when to merely coach and counsel an operator or when they would document the discipline. (TR: 82-83; 180-81). Moreover, both witnesses discussed that they were supervisors based upon the training they received. (TR: 100; 175) Finally, the fact that Road Supervisors view themselves as supervisors under the Act can be gleaned by the entries written by Road Supervisors in their Road Observations and incident reports.

8. Supervisory Meetings

Unlike operators, Road Supervisors participate in supervisory meetings. Road Supervisors attend two (2) separate monthly meetings. (TR: 97-98; 174). Road Supervisors are required to attend a monthly Veolia meeting with the remainder of management where new policies or procedures that are implemented by Veolia or WMATA are discussed. (TR: 98-99). Road Supervisors are also required to attend a monthly meeting at the WMATA headquarters in Hyattsville every second Tuesday of the month. (TR: 174). During these meetings, members of Veolia management are provided policy and procedure updates and policy enforcement initiatives by WMATA. (TR: 98-99; 174). Only members of management attend the Veolia and WMATA monthly meetings. (TR: 174).

9. Training

Road Supervisors receive special training that operators do not receive including, but not limited to, training on: (1) Reasonable suspicion training (drug and alcohol policy); (2) accident investigation; (3) incident investigation; (4) accident and incident reporting; (5) policy and procedure enforcement training; (6) and two (2) to three (3) weeks of receiving on the road training. (TR: 99-102; 174-75). The fact that Road Supervisors receive an extensive amount of training beyond what operators receive further supports the Company's position that Road Supervisors are held out and actually are statutory supervisors as defined under the Act.

10. Equipment

Road Supervisors are assigned and operate "supervisor" vehicles to perform their duties. (Ex. 12); (TR: 133-135). The Road Supervisor vehicles specifically identify the Road Supervisors as "Supervisor" on the front driver-side and passenger-side doors. (Ex. 12). In addition, these vehicles are only driven by Road Supervisors to perform their duties in the field

or by other members of management within the Operations or Safety departments if necessary. (TR: 133-35). Operators are restricted from driving the Road Supervisor vehicle. (TR: 133-35). Operators are only allowed to operate the MetroAccess vans used to transport fare paying customers. (TR: 133-35). Again, similar to the Road Supervisor Uniforms, the fact that the Road Supervisors are assigned and operate vehicles that specifically identify them as supervisors to the public further supports the Company's position that Road Supervisors are held out and actually are statutory supervisors as defined under the Act.

11. Testifying On Behalf of the Employer

Road Supervisors are called upon and required to testify at arbitration and other proceedings on behalf of the employer. (Ex.10); (TR: 105-07; 198-99). The Road Supervisor job duties specifically states that Road Supervisors "may be called upon to testify on behalf of the company at union grievances or safety appeals meetings." (Ex.10). To demonstrate this job duty, both witnesses testified that since they have been employed with Veolia, they have been required to testify at arbitration and an unemployment hearing because their incident reports and accident reports were the center of disputes between terminated operators and the Employer. (TR: 105-07; 198-99). The fact that Road Supervisors' incident and accident reports are called into question by operators that have been terminated – as a direct result of the Road Supervisor's report – and are then required to testify on behalf of the Employer to defend their reports only further demonstrates that the Road Supervisors are statutory supervisors under the Act.

F. In The Event The Board Finds The Road Supervisors Are Not Supervisors Under The Meaning of Section 2(11) of the Act, the Road Supervisors Should Be Encompassed In the Two Collective Bargaining Agreements Entered Into By Veolia With the Amalgamated Transit Union, Local 1764 and International Brotherhood of Teamsters, Local 639.

If the Board determines the Road Supervisors are not supervisors under the meaning of the Act, as a result of Road Supervisors occasionally performing driving work, Road Supervisors should be encompassed under the collective bargaining agreements of the ATU, Local 1764 and Teamsters, Local 639. Article 1 of both the ATU, Local 1764 and the Teamsters, Local 639 collective bargaining agreements specifically state the agreements and the provisions within regulate the relationship between Veolia and “all drivers” and “part-time bus operators.” (Ex.1); (Ex.2).

Pursuant to the Road Supervisor job duties, Road Supervisors are required to be “available to drive a regular route or charter trip as needed to cover the day’s activity.” (Ex.10). At hearing, it was uncontroverted that Road Supervisors are obligated to operate MetroAccess vans when Veolia is short staffed and/or when a driver is taken out of service due to an accident, incident, or injury. (TR: 124). In fact, Mr. Jackson specifically testified that in the year that he has been employed with Veolia, on two separate occasions he has been required to operate a MetroAccess van when Veolia was short staffed or when an operator was hospitalized. (TR: 124). Pursuant to the Article 1 of both collective bargaining agreements, when a Road Supervisor operates or drives a MetroAccess van, the Road Supervisors are performing bargaining unit work covered under exclusive jurisdiction of the two agreements discussed. Thus, when Mr. Jackson operated the MetroAccess van to drop the van off at base as he testified, under the ATU, Local 1764 agreement he was acting as a “part-time bus operator,” and under the Teamsters, Local 639 agreement he was acting as a “driver.”

As a result of the Road Supervisors conducting bargaining unit work, the ATU, Local 1764 and Teamsters, Local 639 have an interest in these proceedings and whether Road Supervisors are supervisors under the meaning of the Act. These two Unions have an interest in these proceedings and the Board's determination in these proceedings as it will greatly affect their bargaining unit members. If the Board determines that Road Supervisors are not supervisors under the Act, yet Road Supervisors continue to perform bargaining unit work as discussed, the Union's members are impacted. The Board has found that subcontracting of unit work impacts a bargaining unit even when unit employees do not lose employment or have reduced wages or hours as a result of the contracting. In *Mi Pueblo Foods*, 360 NLRB No. 116, slip op. at 1-3 (2014). Therefore, ATU, Local 1764 and Teamsters, Local 639 have an interest in these proceedings as the Road Supervisors perform bargaining unit work proscribed under the Unions' collective bargaining agreements, and accordingly, should be members of their bargaining units if they are not supervisors under the meaning of the Act.

Accordingly, because ATU, Local 1764 and Teamsters, Local 639 have an interest in these proceedings as they will be directly affected by the Board's determination, the Regional Director should have provided a notice of hearing to these Unions pursuant to Section 102.63 (a) of the National Labor Relations Board Rules and Regulations. Rule 102.63(a) specifically states, "... the Regional Director shall prepare and cause to be served on the parties and on any known individuals or **labor organizations purporting to act as representatives of any employees directly affected by such investigation**, a notice of hearing before a hearing officer at a time and place fixed herein." (emphasis added). Here, ATU, Local 1764 and Teamsters, Local 639 are labor organizations of employees that will be directly affected by the Regional Director's investigation regarding whether the Road Supervisors are supervisors under the meaning of the

Act. As such, these Unions should have received notice of these proceedings pursuant to Rule 102.63 and provided fair and equal opportunity to intervene and present necessary evidence pursuant to Rule 102.65(b) of the National Labor Relations Board Rules and Regulations.

V. CONCLUSION

Pursuant to the foregoing reasons, Veolia Transportation Services, Inc. has established the Union's proposed unit of Road Supervisors is inappropriate because they are statutory supervisors under Section 2(11) of the Act. Accordingly, the Board should uphold the Region's Decision regarding Union's petition in its entirety. Alternatively, in the event the Board determines the Road Supervisors are not supervisors under the Act, the Board should find that the Road Supervisors are encompassed under the bargaining unit defined under the collective bargaining agreements between Veolia Transportation, Inc., and Amalgamated Transit Union, Local 1754 and International Brotherhood of Teamsters, Local 639.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this 4th day of May, 2015, served an original and one (1) copy of the foregoing via the National Labor Relations Board's electronic filing system addressed as follows:

Mr. Gary Shinnars
Executive Secretary
National Labor Relations Board
1099 14th St. N.W.
Washington, D.C. 20570-0001

I hereby further certify that I have this 4th day of May, 2015, served a true and correct copy of the foregoing on the following via Electronic Mail addressed as follows:

Douglas Taylor
Gromfine, Taylor and Tyler, PC
1420 King Street, Suite 500
Alexandria, VA 22314

/s/ James N. Foster, Jr.

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5**

**VEOLIA TRANSPORTATION SERVICES,
INC. d/b/a VEOLIA TRANSPORTATION,**

Employer,

and

Case No. 05-RC-137335

**AMALGAMATED TRANSIT UNION
LOCAL 689, associated with
AMALGAMATED TRANSIT UNION,
AFL-CIO**

Petitioner.

**EMPLOYER VEOLIA TRANSPORTATION SERVICES, INC.'S
STATEMENT IN OPPOSITION
TO THE UNION'S REQUEST FOR CONSOLIDATION AND REVIEW**

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TABLE OF CONTENTS

I. PROCEDURAL BACKGROUND	4
A. Representation Petition.	4
B. Failure to Give Notice	5
II. THE REGIONAL DIRECTOR’S DECISION AND OPINION	5
III. ISSUE RAISED IN THE UNION’S REQUEST FOR REVIEW	7
IV. STATEMENT OF FACTS	7
V. THE UNION’S MOTION FOR CONSOLIDATION MUST BE DENIED	8
A. Brief Statement of the Law	8
B. The Union’s Request to Consolidate This Matter and <i>Diamond Transportation</i> is Not Appropriate and Must be Denied	8
1. Consolidation is Improper Because the Union Failed to Move for Consolidation at the Representation Hearing.....	9
2. Consolidation Is Improper Because It Would Deny Veolia Its Due Process Rights	9
3. Consolidation Is Improper Because It Would Deny ATU, 1764 And Teamsters, 639 Their Due Process Rights.....	10
4. Consolidation Is Improper Because The Facts of The Two Cases Are Distinguishable .	11
5. Consolidation is Improper Because Veolia and Diamond are NOT Sufficiently Related	12
6. Consolidation is Improper Because it Would Result in Unnecessary Delay and Unnecessary Costs	13
7. Conclusion	14
VI. The Regional Director Correctly Concluded Veolia’s Road Supervisors Are Section 2(11) Supervisors Under the Act Because They Discipline Veolia Operators.....	14
A. Applicable Legal Principles of Supervisors Under the Act	14
B. The Regional Director Correctly Ruled That Road Supervisors Directly Issue Discipline to Operators.....	16
C. The Evidence Clearly Established That Road Supervisors Exercise Independent Discretion In Disciplining Operators By Removing Operators From Service	20
D. The Regional Director Correctly Concluded That the Road Supervisors Are Statutory Supervisors Under The Act Because of The Secondary Indicia of Supervisory Status	23

VII. In The Event The Board Remands This Matter To The Regional Director, The International Brotherhood of Teamsters, Local 639 and Amalgamated Transit Union, Local 1764 Must Be Given Proper Notice of the Proceedings.....	23
VIII. CONCLUSION	26

**EMPLOYER VEOLIA TRANSPORTATION SERVICES, INC.'S
STATEMENT IN OPPOSITION**

Comes now, Veolia VEOLIA TRANSPORTATION SERVICES, INC. ("Veolia" or "Employer" or "Company"), by and through its undersigned counsel, pursuant to Section 102.67(e) of the National Labor Relations Board Rules and Regulations, and herewith submits its Statement in Opposition to the Amalgamated Transit Union, Local 689's ("Union" and/or "Petitioner") Request for Review.

I. PROCEDURAL BACKGROUND

A. Representation Petition.

On August 6, 2014, the Union filed a Representation Petition with the Board seeking to become the collective bargaining representative of Road Supervisors, Safety and Training Supervisors, and Safety Trainers employed by Veolia at its facilities located at 3201 Hubbard Road in Hyattsville, Maryland and 2219 Adams Place NE in Washington, D.C.¹ On August 29, 2014, the Union withdrew its Petition, which was approved by the Regional Director. On September 23, 2014, the Union re-filed a Representation Petition in the current proceeding to become the collective bargaining representative of the above described unit. In accordance with NLRB procedures, the Board conducted a one (1) day hearing on October 7, 2014, before Hearing Officer Jason Usher. Appearing for Veolia were James N. Foster, Jr., Esq. and Dean Kpere-Daibo, Esq. Veolia presented three witnesses at hearing. Appearing for the Petitioner were Douglas Taylor, Esq. and Brian Connolly, Esq. The Union did not present any witnesses at hearing.

During the hearing and on the record, the Petitioner amended its pending Petition to the extent the Union was no longer seeking to represent the Safety and Training Supervisors and

¹ Veolia's Operators that are supervised by the Road Supervisors are represented by two separate unions, the Amalgamated Transit Union, Local 1764 and the International Brotherhood of Teamsters, Local 639.

Safety Trainers. (TR: 7-8). The Union sought in its amended Petition to only represent the Road Supervisors and Lead Road Supervisors, excluding Safety and Training Supervisors and Safety Trainers among others. (TR: 7-8). As a result of the Union's partial withdrawal of its Petition, Veolia moved for the Regional Director to issue an Order approving the withdrawal of the Union's Petition seeking to represent the full-time and regular part-time Safety and Training Supervisors and Safety Trainers pursuant to Rule 102.60 of the National Labor Relations Board Rules and Regulations. (TR: 7-8). The issue at hearing was whether the Road Supervisors the Union sought to represent were statutory supervisors under Section 2(11) of the Act. Veolia and the Union filed post-hearing briefs on October 16, 2014.

B. Failure to Give Notice.

The NLRB failed to provide notice of the October 7, 2014 hearing to the two unions that represent Veolia's operators. Notice to the ATU, Local 1764 and Teamsters, Local 639 was required pursuant to Rule 102.63(a) of the National Labor Relations Board Rules and Regulations as they are labor organizations that represent employees that will be affected by these proceedings. Road Supervisors perform driving work which is under the exclusive jurisdiction of the bargaining units represented by the ATU, Local 1764 and Teamsters, Local 639. However, proper notice of the representation hearing was not provided to these parties who should be or otherwise were affected by the proceeding and the Regional Director's Decision and Order in this matter. (TR: 18).

II. THE REGIONAL DIRECTOR'S DECISION AND OPINION

On October 27, 2014, the Regional Director for Region 5 issued a Decision and Order, wherein the Regional Director correctly concluded Veolia's Road Supervisors are statutory supervisors pursuant to Section 2(11) of the Act inasmuch as, among other things, the Road

Supervisors exercise independent discretion to discipline operators. In reaching this conclusion, the Regional Director went through an exhaustive legal and factual analysis of all applicable Board precedent and relevant facts that are specific and exclusive to the Road Supervisors employed by Veolia.

To come to such conclusion, the Regional Director found Veolia Road supervisors have the authority to orally coach and counsel Veolia operators, write up operators, and remove operators from service. (*See* Decision and Order, p.15). The Regional Director further concluded when a Road Supervisor issues a verbal or written warning, such discipline goes into the operator's personnel file. (*See* Decision and Order, p.7,15). (*See* Decision and Order, p.7,15). Significantly, the Regional Director concluded the Road Supervisors' authority to issue verbal and written warnings to Veolia operators are explicitly contemplated by the progressive discipline systems contained in the two collective-bargaining agreements covering Veolia operators. Thus, the oral and written warnings issued by Road Supervisors fall under the purview of the collective bargaining agreements and, pursuant to the agreements, are grievable. Accordingly, the Regional Director concluded Road Supervisors have the authority to discipline employees at Veolia. (*See* Decision and Order, p.7-8). Equally as important, the Regional Director further concluded that these circumstances and facts were **in marked contrast** to the facts of *Diamond Transportation*, where evidence presented during that hearing failed to meet the Board's standard for determining supervisory status promulgated in *The Republican Co.*, 361 NLRB No. 15 (2014).

Moreover, the Regional Director concluded the Road Supervisors are statutory supervisors because they exercise independent judgment in determining the level of discipline to apply to an operator. Again, and equally as important, the Regional Director concluded the

decision in *Diamond Transportation* and the decision in the matter at hand are distinguishable because in this case, Veolia presented uncontroverted record evidence demonstrating that the operators are subject to a progressive discipline system and Road Supervisors' written warnings and memorializations of oral warnings are placed in operators' personnel files.

Finally, the Regional Director held the numerous secondary indicia of supervisory status, including, but not limited to, different uniforms, office space accessibility, training, management meetings, and the ratio of supervisors to operators, also supports the conclusion that Road Supervisors are statutory supervisors.

III. ISSUE RAISED IN THE UNION'S REQUEST FOR REVIEW.

On November 11, 2014, the Union filed its Request for Review of the Regional Director's Decision and Order. In its Request for "Review," the Union asserts "there is no distinction between the duties of Road Supervisors" in *Diamond Transportation* and the Road Supervisors in the matter at hand, and moved to have "the Review" in *Diamond* and this matter consolidated. (*See* Union's Request for Review). In addition, the Union asserts because *Diamond Transportation* and Veolia Transportation Road Supervisors both partly enforce WMATA rules and regulations, the Regional Directors' Decision and Order in this matter that Veolia's Road Supervisors are supervisors under the Act is incorrect. Veolia now files its Statement in Opposition to the Union's Request for Review.

IV. STATEMENT OF FACTS

Rather than simply repeat the factual recitations contained in the Veolia's Post-Hearing Brief submitted to the Region, Veolia incorporates by reference said brief and attaches it to this Statement in Opposition as Attachment A for the Board's Review. Furthermore, the Regional Director's Decision and Order is attached as Attachment B.

V. THE UNION'S MOTION FOR CONSOLIDATION MUST BE DENIED

A. Brief Statement of the Law

Pursuant to Section 102.72(c) of the NLRB Rules and Regulations, the Regional Director may exercise the power to consolidate a petition with any other petition and/or proceedings that may have been instituted in the same Region. When making such determination, the Regional Director will consider whether such consolidation appears necessary in order to effectuate the purpose of the Act, or to avoid unnecessary costs and/or delays. NLRB Rules and Regs Sec. 102.72 (a),(c). In addition, pursuant to the NLRB Representation Proceedings Case Handling Manual, § 11716, consolidations occur in representation cases where the Employer is the same in each case or multiple employers are sufficiently related.

B. The Union's Request to Consolidate This Matter and *Diamond Transportation* is Not Appropriate and Must be Denied.

The Union's request to consolidate the matter at hand with the *Diamond Transportation* Case Number 05-RC-134217 (hereinafter "Diamond") is improper and must be denied. First, pursuant to Section 102.72(c), a request of consolidation should have been made to the Regional Director prior to the hearings in both proceedings to provide the necessary due process to the parties involved and other interested parties. Second, the cases are factually distinguishable. Third, consolidation of these two cases would be improper pursuant to NLRB Representation Proceedings Case Handling Manual, § 11716 inasmuch as Veolia and Diamond are not sufficiently related.

1. Consolidation is Improper Because the Union Failed to Move for Consolidation at the Representation Hearing.

The Union's request for consolidation must fail insofar as its request for consolidation is untimely. In this respect, the Union never requested consolidation of these two matters to the Regional Director.

Clearly, any request for consolidation should have been made to the Regional Director prior to the Region holding a hearing and issuing a Decision and Opinion. The Union, however, despite having absolute control over the filing of this petition and the petition in *Diamond*, failed to process the petitions at the same time in order to correctly and timely request that the Regional Director consolidate the petitions. Instead, the Union filed both petitions in early August but then withdrew the Veolia petition. If the Union believed that the consolidation was proper in order to effectuate the purposes of the Act and/or to preserve the scarce judicial and administrative resources of the NLRB, it could have requested that the Regional Director consolidate the proceedings in early August, 2014 when both petitions were filed and pending. The Union, however, voluntarily chose to manipulate the process by withdrawing the initial Veolia Petition and proceeding to hearing and receiving the Regional Director's Decision and Order in *Diamond* so that it could attempt to argue that the decision in *Diamond* should be dispositive to the resolution of the case at hand.² The Union's conduct in this respect mandates that the Union's Motion to Consolidate be denied.³

2. Consolidation Is Improper Because It Would Deny Veolia Its Due Process Rights.

Consolidation of the two cases after the Regional Director has heard all the evidence in both proceedings and issued his Decision and Order is improper because it prevents Veolia from

² The Union miscalculated the significance of the factual differences in the two cases as highlighted by the Regional Director in the Decision and Order.

³ Veolia asserts that the Union has failed to properly move the Board to consolidate these matters.

receiving the necessary and required due process. More specifically, Veolia was not given notice of the Union's Petition and hearing in the *Diamond* case. Without such notice, Veolia was not provided the necessary opportunity to present witnesses, cross-examine witnesses, or review documents entered into evidence during the *Diamond* case. Veolia and Diamond had separate procedural processes and separate hearings that established separate and distinct evidence.⁴ In fact, the only party that was provided notice of both proceedings, presented evidence in both hearings, and was provided the opportunity to cross-examine witnesses in both hearings was the Union. The Union now requests the Board to review this case and determine whether VEOLIA's Road Supervisors are supervisors under the meaning of the Act based upon facts that were presented in a hearing Veolia was not provided notice of or given the opportunity to be present at and based on facts that may not even apply to Veolia. In light of the above, consolidation is clearly not appropriate.

3. Consolidation Is Improper Because It Would Deny ATU, 1764 And Teamsters, 639 Their Due Process Rights.

In addition, the NLRB failed to provide notice of the *Diamond* proceedings to the Amalgamated Transit Union, Local 1764 ("ATU") and International Brotherhood of Teamsters, Local 639 ("Teamsters"), the two unions that Veolia has collective bargaining agreements with covering Veolia's operators.⁵ If consolidation of these two cases is appropriate, notice of the *Diamond* proceedings to the ATU, Local 1764 and Teamsters, Local 639 would have been required pursuant to Rule 102.63(a) of the National Labor Relations Board Rules and

⁴ Importantly, it is the distinguishable factual evidence that resulted in the two distinct decisions.

⁵ In the matter at hand, the two unions were not provided notice of the petitions or hearing in this proceeding and such oversight was improper pursuant to Rule 102.63(a) of the National Labor Relations Board Rules and Regulations. In fact, Teamsters, Local 639 had to file a Motion to Intervene to be placed on the ballot in the event an election was ordered because of their interest in the petitioned unit. (See *Attached*, Teamsters, Local 639 Motion to Intervene).

Regulations as they are labor organizations that represent employees that would have been affected by the *Diamond* proceedings.

Neither the Teamsters nor the ATU were given notice of the petition or the hearing in *Diamond*. These unions were not provided the opportunity to intervene and present evidence of their possible interest in the petitioned unit. Therefore, inasmuch as there are two interested unions that did not receive notice and were not been given the opportunity to be heard and participate in the *Diamond* case, the Union's request to consolidate must be denied.

4. Consolidation Is Improper Because The Facts of The Two Cases Are Distinguishable.

In its Motion to Consolidate, the only argument advanced by the Union in support of consolidation is that there is no distinction between the duties of a Road Supervisor at Diamond and a Road Supervisor at Veolia. Initially, it is imperative to note that the Union's statement in this respect is not only unsupported by the record evidence but the record evidence also directly contradicts it. Of particular importance is the undisputed fact that Veolia's operators are represented by two unions and the terms and conditions of employment of the Veolia operators' is governed by two collective bargaining agreements. In sharp contrast, Diamond's operators are not represented by a union and the resulting impact of this fact was heavily relied upon by the Regional Director in distinguishing the two cases. In this respect, the Regional Director noted that Veolia presented uncontroverted record evidence demonstrating that Veolia operators are subject to a progressive discipline system created and acknowledged by the two collective bargaining agreements covering Veolia's operators. He further concluded the Road Supervisors' written warnings and memorializations of oral warnings were placed in operators' personnel file and were part progressive discipline procedure defined in the collective bargaining agreements.

The Regional Director found these facts and others distinguishable from the facts of *Diamond* and such facts must result in the Union's Motion to Consolidate.

5. Consolidation is Improper Because Veolia and Diamond are NOT Sufficiently Related.

The Board should deny the Union's request for consolidation because Veolia and Diamond are not sufficiently related. Veolia contracts with cities, counties, airports, companies and universities to operate their transportation systems nationwide. In regards to the matter at hand, Veolia contracts with the WMATA to perform transit services for disabled and vulnerable customers. Veolia is one of three transportation providers of transportation services for WMATA's MetroAccess Project. (*See Attached*, March 1, 2013, Metro News Release). However, Veolia is the largest contractor in the WMATA system. As the largest contractor, Veolia employs approximately 750 to 800 employees to service the WMATA transportation contract. Also, as previously discussed above, Veolia has existing collective bargaining agreement with the Amalgamated Transit Union, Local 1764 and International Brotherhood of Teamsters Union, Local 639, covering Veolia's operators. (Ex-1; Ex-2); (Ex.14).

In contrast, Diamond Transportation is a local transportation company which focuses on an array of transportation services, including charter buses, school buses, as well as paratransit. (*See Attached*, Diamond Transportation Website). Diamond Transportation is a self-proclaimed Northern Virginia Company that is dedicated to providing Northern Virginia with a wide variety of transportation options. (*See Attached*, Diamond Transportation Website). In regards to the services Diamond provides to WMATA, Diamond provides the smallest amount of service to the WMATA contract only receiving 9.79 million for its services.⁶ Accordingly, Diamond does not

⁶ In comparison, Veolia receives 36.46 Million for its services provided to WMATA.

employ nearly the amount of employees to service the WMATA contract as Veolia. Finally, Diamond does not have two union contracts covering its operators.

Although Veolia and Diamond are both contractors for the WMATA transportation system, the two Employers are separate and distinct. Veolia hires, trains, supervises and terminates its own employees. Neither Veolia nor Diamond has control over the actions of one another's operators or Road Supervisors. While both Road Supervisors enforce WMATA policies and procedures, Veolia Road Supervisors are also tasked with enforcing Veolia specific rules and procedures. (TR: 51-52; 173); (TR: 191-192; 60-61). In addition, the two Employers provide separate and distinct job descriptions to their Road Supervisors. (Ex. 10). The incident reports and operator evaluations prepared by Veolia Road Supervisors are identified with a Veolia Transportation label, not WMATA or Diamond. In fact, it is clear that the two employers do not utilize the same documents for their respective Road Supervisors to prepare and utilize while performing their duties. Also, Veolia employees are housed at facilities located at 3201 Hubbard Road in Hyattsville, Maryland and 2219 Adams Place NE in Washington, D.C. No Diamond employees are housed at either of these two locations. Accordingly, other than the two Employers providing service to WMATA, the two are separate and distinct in every way.

Therefore, based upon the facts described above, in the record of these proceedings, and in the Regional Director's Decision and Order, it is axiomatic that Veolia and Diamond are not sufficiently related. As a result, the Board must deny the Union's request to consolidate the *Diamond* case and the matter at hand.

6. Consolidation is Improper Because it Would Result in Unnecessary Delay and Unnecessary Costs.

Consolidation of these two matters would require the Board to spend an inordinate amount of time culling through the record presented in the instant matter and in *Diamond* in

order to engage in a comparison of the evidence presented. This exercise would take a considerable amount of time and require the Board to use a considerable amount of resources, including financial resources. Stated another way, contrary to Section 102.72 of the Boards Rules and Regulations, consolidation would result in unnecessary delay and unnecessary costs.

7. Conclusion

In short, consolidation of the instant matter and Diamond is precluded by the Union's failure to request consolidation in a timely manner. In addition, consolidation is improper because the two cases are factually distinguishable. Finally, consolidation in no way effectuates the purpose of the Act or avoids unnecessary costs or delay; instead consolidation prevents the parties from having the required notice, due process, and opportunity to be heard on in these proceedings and would result in unnecessary costs and delay.

VI. THE REGIONAL DIRECTOR CORRECTLY CONCLUDED VEOLIA'S ROAD SUPERVISORS ARE SECTION 2(11) SUPERVISORS UNDER THE ACT BECAUSE THEY DISCIPLINE VEOLIA OPERATORS.

A. Applicable Legal Principles of Supervisors Under the Act.

Section 2(11) of the Act defines "supervisor" as:

an individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the forgoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

29 U.S.C. § 152(11). The possession of any one of the indicia specified in Section 2(11) is sufficient to confer supervisory status, as long as the authority is carried out in the interest of Veolia and requires the exercise of independent judgment. *Arlington Masonry Supply, Inc.*, 339 NLRB 817 (2003). "Failure to exercise authority does not negate supervisory status because

possession rather than exercise of supervisory authority determines supervisory status.” *Westwood Health Care Center*, 330 NLRB 935, 938 (2000). Stated slightly differently, it is the existence of the supervisory power that determines whether the individual is a supervisor under the Act, not whether the individual actually has exercised that power. *Arlington Masonry Supply, Inc.*, 339 NLRB at 818.

Thus, applying the foregoing definition, individuals are supervisors if “(1) they hold the authority to engage in any 1 of the 12 supervisory functions listed in Section 2(11); (2) their exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment; and (3) their authority is ‘held in the interest of the employer.’” *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 713 (2001). An individual’s supervisory status can be established if the putative supervisor has the authority to either perform a supervisory function or **to effectively recommend a supervisory function**. The burden of establishing supervisory status rests upon the party seeking to assert the status. *Dean & DeLuca New York, Inc.*, 338 NLRB 1046, 1047 (2003).

An employee is a supervisor under the meaning of the Act if the employee has the authority to discipline. *The Republican Co.*, 361 NLRB No. 15 (2014). Such authority, however, must lead to personnel action without independent investigation by upper management. *Id. citing Sheraton Universal Hotel*, 350 NLRB 1114, 1116 (2007). The issuing of verbal warnings and/or reprimands without additional disciplinary action taken is too minor a disciplinary function to constitute supervisory authority. *Id.* In *Republican Co.*, the Board ruled that “[a] warning may qualify as disciplinary within the meaning of Section 2(11) if it ‘automatically’ or ‘routinely’ leads to job-affecting discipline, by operation of a defined progressive disciplinary system, and the role the warnings play within the system.” *Id.* The Regional Director correctly concluded that

Veolia's Road Supervisors issue verbal and written discipline to operators and that such discipline initiates the progressive discipline system defined by the two collective bargaining agreements that cover Veolia's operators.

B. The Regional Director Correctly Ruled That Road Supervisors Directly Issue Discipline to Operators.

The Regional Director correctly concluded that Veolia's Road Supervisors are "supervisors" within the meaning of Section 2(11) of the Act because they are authorized to directly issue discipline. Here, the evidence adduced at hearing establishes that (1) counseling and coaching constitute discipline, (2) the Road Supervisors are authorized and actually do directly discipline operators by issuing counseling and coaching in the field, and (3) Road Supervisors' ability to remove an operator from service is discipline.

Specifically, the uncontroverted evidence presented at hearing overwhelmingly establishes that coaching and/or counseling is the first step of the progressive disciplinary process and constitutes discipline under the Sections 10.2 of the Collective Bargaining Agreements Veolia has entered into with the ATU, Local 1764 and Teamsters, Local 639. (Ex. 1); (Ex. 2); (TR: 196-97). The Collective Bargaining Agreement entered into by Veolia with the ATU, Local 1764 specifically states:

Any violation of posted and/or written Company rules, policies and/or procedures may result in disciplinary action. With exception as listed under "Serious Infractions" below, and the attendance policy, and posted and/or written Company rules, policies, and/or Procedures may result in the following disciplinary action.

First violation: Policy review documented verbal counseling.

Second violation: First Written Warning Notice.

Third Violation: Second Written Warning Notice

Fourth Violation: Suspension of May Result in Discharge from Company.

(Ex. 2); (TR: 196-97) (emphasis added).

Similarly, the Collective Bargaining Agreement entered into by Veolia with the Teamsters, Local 639 states:

Disciplinary measures shall be taken in the following order:

- **Oral reprimand**
- **Written reprimand**
- Suspension, not to exceed five (5) days (notice to be given in writing).
- Discharge

The Company will generally follow this four-step process for most rule or policy infractions. The Employer's focus will be to improve the employee's performance and retain a qualified, trained, and valuable employee.

(Ex. 1); (TR: 196-97) (emphasis added). Thus, the Collective Bargaining Agreements that govern the terms and conditions of Veolia's operators acknowledge and define the verbal coaching and counseling issued to operators by a Road Supervisor as part of the progressive disciplinary system.

Brian Jackson ("Mr. Jackson) and Thomas Holtz ("Mr. Holtz"), are Road Supervisors for Veolia who testifies at hearing. Importantly, both Mr. Jackson and Mr. Holtz testified that when an operator receives coaching and counseling from a Road Supervisor the operator is fully aware that they are being disciplined (TR: 77; 197). Mr. Holtz specifically testified that the verbal counseling he issues to an operator initiates the disciplinary process because it is the first step in the process pursuant to the collective bargaining agreements that govern the relationship between the operators and Veolia. (TR: 197). In fact, he further testified that operators are aware that further violations will lead to more severe discipline down the road (TR: 197) and that, "When out on the road, what a Road Supervisors says goes." (TR: 77). The fact that the collective bargaining agreements negotiated by the unions that represent the operators acknowledge the authority of the Road Supervisors' ability to verbally coach and counsel operators clearly supports the Company's position that Road Supervisors are true supervisors under the meaning of the Act.

In addition to Road Supervisors having the authority to discipline pursuant to the collective bargaining agreements, Road Supervisors actually exercise this authority by issuing coaching and counseling to operators verbally or in writing by documenting the discipline. The Road Supervisors job duties require Road Supervisors to conduct operator evaluations as well as “discipline and re-training.” (Ex.10). When a Road Supervisor observes an operator committing a violation of Veolia or WMATA policy or procedure, the Road Supervisor will coach and counsel the operator and document the counseling. (TR: 82-83; 180-181). For instance, Mr. Jackson prepared a Road Observation on August 3, 2014, in which the operator did not perform the door-to-door procedure properly. (Ex.9). After observing and documenting the improper door-to-door procedure, Mr. Jackson coached and counseled the operator and documented the discipline in the “comments” section by stating, “Door to door not performed properly due to cancellation . . . **counseled the operator.**” (Ex. 9); (TR: 82). Mr. Jackson also testified that he has disciplined or recommended discipline of operators more than twenty-five (25) times since he became employed as a Road Supervisor with Veolia. (TR: 130). Subsequent to a Road Supervisor coaching and counseling an operator and documenting the discipline in the Road Observation report, these reports are filed in the operator’s personnel file (TR: 78; 181) and are relied upon as part of progressive discipline under the applicable collective bargaining agreements.

These facts clearly demonstrate Road Supervisors’ have the absolute authority to discipline operators. The fact that such a report of counseling is not independently investigated by any superior, but is taken as true and placed in the operator’s personnel file only strengthens Veolia’s position. Road Supervisors play a significant role in not only the initiation of the disciplinary process, but also in the overall disciplinary process. Without Road Supervisors

coaching and counseling Veolia operators and documenting such discipline, the other members of management would have no way of knowing if operators cannot perform their duties properly and should receive further discipline. Thus, consistent with applicable Board precedent, Road Supervisors have the authority to issue discipline.

Equally as important, the undisputed evidence presented at hearing establishes Road Supervisors exercise independent discretion and authority in determining when to merely issue a verbal coaching and counseling without documenting the discipline. (TR: 82-83; 180-181). Road Supervisors Mr. Jackson and Mr. Holtz testified that there are instances in which they merely verbally coach and counsel an operator instead of documenting the discipline in their Road Observation reports. (TR: 82-83; 180-181). Mr. Jackson testified that he will merely verbally counsel an operator if the operator violates a minor policy and the operator is inexperienced. (TR: 79-80). Specifically, Jackson testified:

When I approach a driver . . . one of the first questions I asked is how long have you been driving, you know, how long you been a driver because I know a lot of them, we train a lot of drivers and we release a lot of drivers week to week, and I don't know the new and who's not, and sometimes if there's a driver that's, you know, that's been out there, that's their fourth day, and they're doing everything right but they forgot to put their cone out, I might even assist them putting the cone out and I'll coach and counsel with them and just say, het, listen, next time make sure you always put your cone out.

(TR: 74).

Accordingly, the uncontroverted evidence demonstrates that when a Road Supervisor observes an operator violate a policy or procedure, the Road Supervisor will approach the operator to coach and counsel the operator. (TR: 74). Also, Road Supervisors exercise independent discretion in determining whether to document the discipline within a Road Observation report. (TR: 74). Such use of discretion in determining when to document discipline is a perfect example of the Road Supervisors use of "independent judgment" as defined by the

Supreme Court in *Kentucky River*. 532 U.S at 713. The Road Supervisors decision whether to document counseling is neither dictated by detailed instructions from management nor provided for in Veolia's policies or procedures. The Road Supervisors are clearly making their own independent decision regarding whether a violation is severe or minor and are taking into consideration outside factors such as the experience of the operator. The Union presented no evidence and the record is devoid of any competent evidence establishing that such decisions are routine or that Road Supervisors are instructed by management or policy when to document counseling. In short, the un-contradicted record evidence irrefutably establishes that Road Supervisors make the decision whether to document counseling based upon their own independent discretion and judgment.

C. The Evidence Clearly Established That Road Supervisors Exercise Independent Discretion In Disciplining Operators By Removing Operators From Service.

In addition, Road Supervisors have the authority and exercise the authority to remove an operator from service for violations of Veolia and WMATA policies. (TR: 62; 182). Mr. Jackson testified that under WMATA's reasonable suspicion policy (drug and alcohol policy), if a Road Supervisor has a reasonable suspicion that an operator is under the influence of drugs or alcohol, the Road Supervisor has the authority to remove the operator from service. (TR: 102; 104-05). Road Supervisors make this determination by observing an operator's behavior, speech pattern, odor, color of the eyes, as well as any other possible signs that an operator may be under the influence of drugs or alcohol. (TR: 104). Road Supervisors make the decision to remove an operator out of service to be tested for drugs or alcohol. (TR: 104-05). During the hearing, Mr. Holtz testified that he removed an operator because he believed the operator had consumed alcohol and **he alone made the determination that the operator was not fit to perform his duties.** (TR: 177). Also, once an operator is removed from service due to the Road Supervisor's

reasonable suspicion, the operator is placed on **administrative suspension** until the results of the drug and alcohol test are returned to Veolia. (TR: 177).

To make such a determination, Road Supervisors have to rely upon their training, personal experiences, and independent judgment regarding whether an operator is under the influence of drugs or alcohol. There is nothing routine or clerical regarding a Road Supervisor having to observe each operator they come into contact with to ensure the operator is fit for duty. Each time a Road Supervisor comes into contact with an operator, the Road Supervisor must be alert and use their independent judgment or discretion to determine whether an operator is behaving oddly or operating the vehicle improperly which leads the Road Supervisor to believe that the operator is under the influence. This is no easy task and although Road Supervisors have been trained to recognize the signs of an unfit operator, each day Road Supervisors must go out on the road and use his/her judgment to determine whether operators are safe to perform their duties. There is nothing routine about these occurrences and the training Road Supervisors receive in no way eliminates the independent judgment necessary to determine whether an operator is under the influence.

Moreover, testimony presented at hearing established that Road Supervisors have the authority to remove an operator for unsafe acts in a vehicle if they deem it necessary. (TR: 191-92). Road Supervisor Holtz testified that Road Supervisors have the authority to remove an operator for committing unsafe acts in a MetroAccess van such as a U-turn. (TR: 192). The Veolia policy against making such maneuvers does not require that an operator be taken out of service for such unsafe acts; however, Road Supervisors use their own discretion and judgment to determine whether to remove operators from service. (TR: 192). Lastly, Road Supervisors even have the authority to prevent an operator from going into service or can remove an operator

from service if the Road Supervisor observes an operator not wearing the proper Veolia operator uniform. (TR: 201). When a Road Supervisor removes an operator from service, the operator does not receive their hourly wage for the remainder of their scheduled shift. (TR: 116). Thus, such a removal is clearly disciplinary in nature similar to a suspension.

A Road Supervisor removing an operator for unsafe acts is clearly an exercise of independent judgment necessary to establish supervisory status under the meaning of the Act. Such a removal is not pursuant to a Veolia or WMATA policy and is strictly a judgment call made by the Road Supervisor who witnessed the unsafe act. The record is clear that such removals are not reviewed, second guessed, or investigated independently by another member of management. In fact, Mr. Jackson made it very clear in his testimony that when he decides to remove an operator, it's his decision to make as he and other Road Supervisors are the eyes and ears of management and are the only supervisors who are able to make such decision on the road. (TR: 74; 92).

In summary, based upon the uncontroverted evidence presented at hearing, the Regional Director's conclusion that Veolia's Road Supervisors are supervisors under the meaning of the Act is correct. The uncontroverted evidence adduced at hearing clearly established that Veolia's Road Supervisors directly discipline Veolia operators pursuant to the progressive discipline system defined within the applicable collective bargaining agreements governing Veolia's operators. The evidence discussed above also clearly establishes that Veolia Road Supervisors use independent judgment when determining to issue discipline to Veolia operators including determining whether to remove an operator from service. As the Regional Director concluded, such facts meet the requirements set by the Board in *The Republican Co.*, and is in marked contrast to the evidence presented in *Diamond Transportation*. The evidence set forth at hearing,

as summarized in attached Post-Hearing Brief, clearly establishes the Regional Director's Decision and Order must be adopted.

D. The Regional Director Correctly Concluded That the Road Supervisors Are Statutory Supervisors Under The Act Because of The Secondary Indicia of Supervisory Status.

The Regional Director also correctly concluded that the abundance of record evidence of secondary indicia of supervisory status readily supports a finding that the Road Supervisors are statutory supervisors under the Act. The Company provided a detailed summary of the secondary indicia in its Post-Hearing Brief at pages 40-47, a copy of which is attached. The Regional Director correctly relied on many of these facts in his Decision, including, without limitation, the fact that Road Supervisors wear different uniforms, have different access to office space, participate in different training, participate in management meetings, and the ratio of supervisors to operators (44:1).

VII. IN THE EVENT THE BOARD REMANDS THIS MATTER TO THE REGIONAL DIRECTOR, THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 639 AND AMALGAMATED TRANSIT UNION, LOCAL 1764 MUST BE GIVEN PROPER NOTICE OF THE PROCEEDINGS.

If the Board determines the Road Supervisors are not supervisors under the meaning of the Act, the Road Supervisors should be encompassed under the collective bargaining agreements of the ATU, Local 1764 and Teamsters, Local 639's. In addition, both Teamsters, Local 639 and ATU, Local 1764 must be given proper notice of any additional hearings and/or proceedings in this matter. Article 1 of both the ATU, Local 1764 and the Teamsters, Local 639 collective bargaining agreements specifically states the agreements and the provisions within regulate the relationship between Veolia and "all drivers' and "part-time bus operators." (Ex.1); (Ex.2).

Pursuant to the Road Supervisor job duties, Road Supervisors are required to be “available to drive a regular route or charter trip as needed to cover the day’s activity.” (Ex.10). At hearing, it was uncontroverted that Road Supervisors are obligated to operate MetroAccess vans when Veolia is short staffed and/or when a driver is taken out of service due to an accident, incident, or injury. (TR: 124). In fact, Mr. Jackson specifically testified that in the year that he has been employed with Veolia, on two separate occasions he has been required to operate a MetroAccess van when Veolia was short staffed or when an operator was hospitalized. (TR: 124). Pursuant to the Article 1 of both collective bargaining agreements, when a Road Supervisor operates or drives a MetroAccess van, the Road Supervisors are performing bargaining unit work covered under exclusive jurisdiction of the two agreements discussed. Thus, when Mr. Jackson operated the MetroAccess van to drop the van off at base as he testified, under the ATU, Local 1764 agreement he was acting as a “part-time bus operator,” and under the Teamsters, Local 639 agreement he was acting as a “driver.”

As a result of the fact that Road Supervisors, conduct bargaining unit work, the ATU, Local 1764 and Teamsters, Local 639 have an interest in these proceedings and whether Road Supervisors are supervisors under the meaning of the Act. These two unions have an interest in these proceedings and the Board’s determination in these proceedings, as it will greatly affect their bargaining unit members. If the Board determines that Road Supervisors are not supervisors under the Act, yet Road Supervisors continue to perform bargaining unit work as discussed, the Union’s members are impacted. The Board has found that subcontracting of unit work impacts a bargaining unit even when unit employees do not lose employment or have reduced wages or hours as a result of the contracting. In *Mi Pueblo Foods*, 360 NLRB No. 116, slip op. at 1-3 (2014). In fact, on or about October 7, 2014, the Teamsters, Local 639 filed a Motion to

Intervene expressing their interest in the Road Supervisors unit and requesting to be placed on the election ballot. (*See attached*, October 7, 2014, Teamsters Motion to Intervene). Therefore, ATU, Local 1764 and Teamsters, Local 639 have an interest in these proceedings as the Road Supervisors perform bargaining unit work proscribed under the Unions' collective bargaining agreements, and accordingly, should be members of their bargaining units if they are not supervisors under the meaning of the Act.

Accordingly, because ATU, Local 1764 and Teamsters, Local 639 have an interest in these proceedings as they will be directly affected by the Board's determination, the Regional Director should have provided a notice of hearing to these Unions pursuant to Section 102.63 (a) of the National Labor Relations Board Rules and Regulations. Rule 102.63(a) specifically states, ". . . the Regional Director shall prepare and cause to be served on the parties and on any known individuals or **labor organizations purporting to act as representatives of any employees directly affected by such investigation**, a notice of hearing before a hearing officer at a time and place fixed herein." (emphasis added). Here, ATU, Local 1764 and Teamsters, Local 639 are labor organizations of employees that will be directly affected by the Regional Director's investigation regarding whether the Road Supervisors are supervisors under the meaning of the Act. As such, these Unions should have received notice of these proceedings pursuant to Rule 102.63 and provided fair and equal opportunity to intervene and present necessary evidence pursuant to Rule 102.65(b) of the National Labor Relations Board Rules and Regulations. Accordingly, in the event the Board orders another hearing or any additional proceedings in this matter, these Unions should receive notice of the additional proceedings pursuant to Rule 102.63 and provided fair and equal opportunity to intervene and present necessary evidence pursuant to Rule 102.65(b) of the National Labor Relations Board Rules and Regulations.

VIII. CONCLUSION.

Pursuant to the foregoing reasons, the Union's Motion to Consolidate must be denied. In addition, the Regional Director correctly concluded in his Decision and Order that the Road Supervisors are statutory supervisors under Section 2(11) of the Act and properly dismissed the Union's petition in its entirety. Accordingly, the Union's request for Review must be denied.

Respectfully submitted,

McMAHON BERGER

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CERTIFICATE OF SERVICE

I hereby certify that I have this 17th day of November, 2014, served an original and one (1) copy of the foregoing via the National Labor Relations Board's electronic filing system addressed as follows:

Mr. Gary Shinnars
Executive Secretary
National Labor Relations Board
1099 14th Street, NW
Washington, D.C. 20570-0001

I hereby further certify that I have this 17th day of November, 2014, served a true and correct copy of the foregoing on the following via Electronic Mail addressed as follows:

Douglas Taylor
Gromfine, Taylor and Tyler, PC
1420 King Street, Suite 500
Alexandria, VA 22314

/s/ James N. Foster, Jr.